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76-490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

LEHIGH AND NEW ENGLAND RAILWAY COMPANY,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA and COMMONWEALTH OF PENNSYLVANIA (Intervenor Below),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Lehigh & New England Railway Company (referred to herein as "L&NE"), respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 9, 1976, July 8, 1976 and July 16, 1976.

Opinions Below

The Opinion of the United States Court of Appeals, filed June 9, 1976, is not yet reported and is reproduced in the Appendix hereto (App. 1a-25a).

The regulations of the Interstate Commerce Commission, which are the subject of this proceeding, were promulgated in the Commission's proceeding, Ex Parte No. 293 (Sub-No. 3), *Implementation of Public Law 93-236, Section 601(e), Regional Rail Reorganization Act of 1973 —Submission of Cost Data To Justify Reimbursement,* and were published in the Federal Register on April 9, 1975, 40 Fed.Reg. 16066—16069 as 49 C.F.R. Part 1126 (App. 26a-36a). The Order promulgating the regulations and the accompanying Report of the Interstate Commerce Commission, which Report is incorporated by reference into the regulations, were issued on March 14, 1975 (App. 37a-93a). A corrected Order and corrected page of the Report were issued by the Commission on March 24, 1975 (App. 94a-96a).

Jurisdiction

L&NE seeks review of the judgment of the United States Court of Appeals which was entered on June 9, 1976 (App. 97a) and of the order of July 8, 1976 denying L&NE's petition for rehearing in banc (App. 99a). A certified copy of the judgment of June 9, 1976 was issued on July 16, 1976 in lieu of a formal mandate (App. 97a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and §2101(c).

Questions Presented

1. Whether a directed service operation pursuant to 49 U.S.C. §1(16)(b) which, as a matter of fact, involves a temporary, possessory taking by the government of the property of the railroad over whose lines the operation is conducted, effects a taking of that property within the meaning of the final clause of the Fifth Amendment to the United States Constitution;

2. Whether the Interstate Commerce Commission has the power to compel, and whether a railroad has a concomitant duty to provide continued service, where (a) the railroad lacks the cash to operate; or (b) its continued operations (*prospectively viewed*) will result in losses which will not foreseeably be recaptured or compensated for; or (c) there is a final Court order in effect prohibiting continued operations;

3. Assuming that a railroad is under a duty to continue its operations under the circumstances set forth in Question 2, *supra;* whether the failure or inability of the railroad to continue operations removes the carrier and its property from the protection otherwise afforded by the final clause of the Fifth Amendment to the United States Constitution;

4. Whether the opinion and judgment of the United States Court of Appeals for the Third Circuit create a judicially declared forfeiture of property rights, unauthorized by Congress;

5. Whether the Commission exceeded its statutory rulemaking authority when it determined when, and by what standards, compensation may be paid for the use of the property over which a directed service operation is conducted;

6. In the event that Question 1, *supra,* should be answered in the affirmative; whether the Commission wrongfully usurped the function of the Judiciary when it determined when, and by what standards, compensation may be paid for the use of the property over which a directed service operation is conducted and whether the standards so established by the Commission fail to provide for just compensation.

Constitutional Provisions, Statute, and Regulations Involved

The Constitutional provision involved is the final clause of the Fifth Amendment which provides:

> Nor shall private property be taken for public use, without just compensation.

The statutory provision involved is Section 601(e) of the Regional Rail Reorganization Act of 1973, as amended, which has been codified as 49 U.S.C. §1(16)(b), set forth in the Appendix at App. 101a through 103a. As stated, *supra,* the regulations involved are the Regulations of the Interstate Commerce Commission, 49 C.F.R. Part 1126, and the accompanying Report which is incorporated by reference into the regulations. The Regulations and Report are set forth in the Appendix at App. 26a through 36a and 37a through 96a.

Statement of the Case

This Petition seeks review of a decision of the United States Court of Appeals for the Third Circuit which decision (a) held that a directed service operation pursuant to Section 601(e) of the Regional Rail Reorganization Act of 1973, as amended, codified as 49 U.S.C. §1(16)(b), does not constitute a taking of the property of the carrier over whose lines the operation is conducted within the meaning of the final clause of the Fifth Amendment to the United States Constitution and (b) upheld the validity of certain "cost form" regulations promulgated by the Interstate Commerce Commission ("Commission") under rulemaking authority conferred by 49 U.S.C. §1(16)(b)(E).

The enactment of 49 U.S.C. §1(16)(b) in January, 1974 filled a perceived deficiency in the Commission's statutory power to deal with the emergent situation of a carrier's inability to provide rail services. 49 U.S.C. §1(16)(b) specifically authorizes the Commission, in such cases, to direct a carrier (the "directed carrier") to provide rail service over the lines of the carrier unable to provide such service (the "other carrier") for a period of up to 240 days. That provision also permits the directed carrier to recover from the Government, a sum equal to the excess of costs over revenues associated with the directed service operation; defines "costs" as ". . . those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and reasonable profit;" and directs the Commission, by general order, to establish a cost form to be used by a directed carrier for the recording of costs and for submission to the Commission in connection with its request for Government reimbursement of excess costs over profit.

The Commission's rulemaking proceeding, Ex Parte No. 293 (Sub-No. 3), resulted in a general order, dated March 14, 1976 (App. 80a); in the challenged "cost form" regulations, 49 C.F.R. Part 1126 (App. 26a), which became

effective on March 31, 1975; and in an accompanying Report (App. 37a), which is incorporated by reference into the challenged regulations. L&NE's primary objection to the cost form regulations and Report is that they prohibit, almost without exception, the inclusion on the cost form, and the recovery by the directed carrier, of payments of rent for the use and occupancy of the property of the other carrier, with the practical result that the other carrier will receive no compensation whatever for the use of its property in a directed service operation* (App. 57a-59a).

L&NE's Interest — Petitioner, L&NE, was a carrier by railroad, which, in January, 1975, notified the Commission that its cash position made continued rail operations impossible. Thereafter, the Commission entered two service orders, subsequently revised, pursuant to 49 U.S.C. §1(16)(b) directing the Lehigh Valley Railroad Company ("LVRR") and the Reading Company ("Rdg") to provide directed service over the rail lines of L&NE. Copies of the Commission's corrected Revised Service Order Nos. 1207 and 1208, establishing these directed service operations are set forth in the Appendix at App. 104a through 123a.

The Commission's promulgation of the cost form regulations, after the commencement of the directed service operations over L&NE's lines, was therefore an administrative determination that L&NE was not entitled to any compensation for the use at the Commission's direction,

* A small amount of rent may be allowable if the directed service operation is profitable to the directed carrier. (App. 59a through 60a).

of its property by LVRR and Rdg.* L&NE, concerned that it might be barred by the collateral attack doctrine from challenging the cost form regulations in a Court of Claims proceeding for compensation, thereupon promptly brought its petition for direct review of the regulations in the United States Court of Appeals.**

L&NE's Contentions — L&NE did not contend in the Court of Appeals (nor does it now contend) that 49 U.S.C. §1(16)(b) is unconstitutional or that Service Order Nos. 1207 and 1208, establishing directed service operations on L&NE's lines, are in any way improper or invalid. L&NE's sole challenge is to the validity of Commission Regulations, 49 C.F.R. Part 1126, promulgated by the Commission's March 14, 1975 Order and to the validity of the Report accompanying that Order and incorporated into the regulations by reference.

In the Court of Appeals L&NE argued that (a) directed service operations under 49 U.S.C. §1(16)(b) constitute a taking of the property of the other carrier within the meaning of the final clause of the Fifth Amendment and that, as a result, the United States must pay just compensation for the use of that property; (b) the Commission in violation of the principles of *Monongahela Navigation Co.* v. *U.S.*, 148 U.S. 312 (1893), usurped the function of the Judiciary by promulgating regulations which establish standards for determining when compensation is to be paid for a directed service operation taking

* As noted above, the regulations would permit a small amount of compensation to L&NE if the directed service operations proved profitable to LVRR and Rdg.

** Jurisdiction in the Court of Appeals was predicated upon the provisions of 28 U.S.C. §2342(5) and §2321(a).

and for determining the measure of such compensation; (c) those standards, actually established by the regulations, do not provide for just compensation for a directed service operation taking; and (d) the regulations are otherwise arbitrary, capricious and incapable of reasoned and uniform application.*

The Court of Appeals, in denying L&NE's petition for review, held that a directed service operation under 49 U.S.C. §1(16)(b) does not constitute a taking within the meaning of the Fifth Amendment. (Slip Opinion, pp. 19-24, App. 19a-24a). That holding was premised upon the Court's conclusions that the Commission has the power to require continued operations by a railroad which has not received Commission abandonment authority under 49 U.S.C. §1(18) despite a cash deficiency, unrecoverable operating losses or a Court order requiring cessation of operations and that the exercise of such power by the Commission would merely constitute a postponement of the right to abandon and not a taking within the meaning of the Fifth Amendment. From this the Court reached its ultimate conclusion, to-wit: ". . . we think it follows directly that [the Commission] could place another carrier on the lines of the carrier unable or unwilling to continue service for a limited period without effecting a taking within the meaning of the fifth amendment." (Slip opinion, p. 20, App. 20a).

Accordingly, the Court declined to rule on the questions of whether the Commission, in promulgating its cost

* L&NE also argued that the Commission exceeded the statutory rulemaking authority conferred on it by 49 U.S.C. §1(16)(b)(E) when it determined when, and by what standards, compensation may be paid for the use of the other carrier's property. The Court of Appeals rejected this argument (Slip opinion, pp. 13-16, App. 13a-16a).

form regulations, usurped the function of the Judiciary to determine what constitutes just compensation and of whether the "benefits" conferred on the other carrier in a directed service operation obviate the need to provide rental to it as a matter of law. (Slip opinion, pp. 19-20, fn. 32, App. 19a, 20a).* The Court of Appeals went on to conclude that the Commission's regulations comport with Congress' intent in enacting 49 U.S.C. §1(16)(b) (Slip opinion, pp. 16-19, App. 16a-19a), and it rejected L&NE's argument that the regulations are arbitrary and capricious (Slip opinion, pp. 24, 25; App. 24a, 25a). Accordingly, the Court of Appeals denied L&NE's petition to review and to set aside the regulations (App. 25a). L&NE thereupon filed a petition for rehearing with suggestion for in banc consideration. By Order of July 8, 1976, the Court of Appeals denied L&NE's petition for rehearing (App. 99a).

* The Court of Appeals did, however, consider what it deemed to be "benefits" to L&NE as a result of the directed service operations over its lines in reaching the conclusion that no taking of property within the meaning of the Fifth Amendment results from a directed service operation under 49 U.S.C. §1(16)(b). See Slip opinion, pp. 19, 23, 10 (App. 19a, 23a, 10a). We contend that while such "benefits" may bear on the issue of just compensation, they are immaterial to the question of whether a taking has occurred within the intention of the Fifth Amendment. In any event evidence of the so-called benefits received by L&NE as a result of the directed service operations over its lines is completely lacking in the record of this proceeding for the review of Commission rulemaking. To the extent that the Court of Appeals relied on these "benefits", it denied L&NE a full hearing and, consequently, due process of law. See *Garner* v. *Louisiana*, 368 U.S. 157, 173 (1961); *Ohio Bell Tel. Co.* v. *Public U. Com. of Ohio*, 301 U.S. 292, 300-306 (1937).

REASONS FOR GRANTING THE WRIT

POINT I

This case involves the first judicial construction and the first administrative application of the recently enacted 49 U.S.C. §1(16)(b), a statute of potentially great significance in the present environment of railroad failures, and Supreme Court review at this time will provide necessary guidance for the statute's further application.

For many years Congress recognized that circumstances might require one carrier to perform the duties or obligations of another carrier or make desirable the use by one carrier of the assets of another. Thus, §3(5) of the Interstate Commerce Act empowers the Commission to direct a carrier to use the terminal facilities of another carrier; §1(15) empowers the Commission to direct a carrier to use the rolling stock of another carrier; and §1(16)(a) (formerly §1(16) before the enactment of §1(16)(b)) empowers the Commission to direct a carrier to move over its own lines the traffic of another carrier. The enactment of §1(16)(b) in January 1974 as §601(e) of the Regional Rail Reorganization Act of 1973, as amended, filled what was considered to be a substantial gap in the Commission's regulatory authority by authorizing the Commission to direct one carrier to move the traffic of another carrier over the other carrier's lines. The codification of §601(e) of the Regional Rail Reorganization Act as a part of the Interstate Commerce Act—rather than as part of Title 45—constitutes a significant Congressional understanding of the depth and significance of railroad problems in the United States today and the likelihood that that statutory provision will have frequent applicability to distressed

railroads, regardless of whether such railroads are undergoing reorganization under §77 of the Federal Bankruptcy Act.

The Commission regulations which have been challenged by L&NE in this proceeding are the first comprehensive regulations issued by the Commission in implementation of 49 U.S.C. §1(16)(b); the opinion and judgment of the Court of Appeals in this proceeding constitute the first judicial interpretation and construction of the statute and the regulations, involving, as well, substantial issues of constitutional magnitude. We respectfully urge the Supreme Court to grant certiorari to review the decision of the Court of Appeals in order to provide definitive guidance as to the meaning and future applicability of the statute and the proper scope of regulations thereunder. Unless certiorari is granted, the opinion of the Court of Appeals for the Third Circuit—which we respectfully contend is erroneous, see Points II and III, *infra*—will provide a far reaching precedent, both with respect to the application of 49 U.S.C. §1(16)(b) and, equally importantly, with respect to the more general question of what governmental interferences with private property constitue takings within the meaning of the Fifth Amendment.

POINT II

The Court of Appeals' conclusion that the Commission may require a railroad to continue to provide rail service, despite a lack of cash, unrecoverable operating losses, or a contrary court order, which conclusion was central to the Court's holding that no Fifth Amendment taking is involved in a directed service operation, conflicts with applicable decisions of this Court, other Courts of Appeals and with other decisions of the Court of Appeals for the Third Circuit.

The Court of Appeals' conclusion that the Commission has the power to compel operations for as much as 240 days, despite a cash deficiency, unrecoverable operating losses, or a contrary Court order, conflicts with established law; denigrates from judicial supremacy; and overlooks the distinction between an abandonment of a line or operations and a mere suspension of operations. Indeed, both Congress and the Commission long recognized the absence of any power on the Commission's part to compel such operations and the absence of any duty on the part of a railroad to operate under such circumstances. 49 U.S.C. §1(16)(b) was enacted to deal with this recognized absence of Commission power and to greatly enlarge the Commission's authority to handle emergencies involving a carrier's inability or failure to operate—but, significantly, Congress did not authorize the Commission to direct continuing operations; rather Congress empowered the Commission to place another carrier on the property of the first upon the Commission's finding of any of three conditions set forth in 49 U.S.C. §1(16)(b); *i.e.,* a lack of cash; a Court order not to operate; or operating losses.

The first two of these conditions—a cash deficiency and a final Court order not to operate—present clear circumstances of impossibility on the part of a carrier to provide continued service. Such circumstances of impossibility have repeatedly been held to justify a carrier's failure to operate—without the need for prior Commission approval. The conclusion of the Court of Appeals that a duty exists to do the impossible was clear error. Furthermore, we respectfully submit that the Court of Appeals, in reaching its additional erroneous conclusion that the Commission may, without effecting a taking, require continued operations at a loss without examining the foreseeability of the prospects of recapture or compensation therefor, misconstrued the *New Haven Inclusion Cases,* 299 U.S. 392 (1970) and wholly ignored numerous relevant decisions of this and other Courts.

Clearly, not every cessation of operations constitutes an abandonment within the meaning of §1(18) of the Interstate Commerce Act; and it is a question for the courts and not for the Commission, to determine whether particular conduct constitutes an abandonment. *Powell* v. *U.S.,* 300 U.S. 276 287 (1937). As was stated in *Zirn* v. *Hanover Bank,* 215 F.2d 63, 69 (2d Cir. 1954):

> To 'abandon' in this context means, we think to give up permanently, not merely to suspend operations for lack of physical equipment. No Commission approval is necessary where the cessation of operations results, not from the volition of the railroad or its bankruptcy-trustee, but from the exercise of the supervening rights, here recognized by the Bankruptcy Act, of third persons.

There have been numerous additional instances in which it has been held that mere suspensions of service, compelled by events beyond the carrier's reasonable control, are not abandonments or discontinuances requiring Com-

mission approval. Thus, it has been held that the following were not abandonments requiring Commission approval: (a) enforcement of a city's lien against a railroad roadbed by execution sale, *City of Alexandria, La.* v. *Chicago, R.I. & Pac. R. Co.,* 311 F.2d 7 (5th Cir. 1963), contra, *Matter of Boston Terminal Co.,* 71 F.Supp. 472 (D. Mass. 1947); (b) cessation of operations caused by washouts of the line which the railroad was unable to repair on a financially feasible basis, *Meyers* v. *Arkansas & Ozark Ry. Corp.,* 185 F.Supp. 36 (D.C. Ark. 1960) and see also *Asbury* v. *Chesapeake & Ohio Ry. Co.,* 264 F.Supp. 437 (D.C.D.C. 1967); (c) cessation of operations when there is no service demand, *McGrody* v. *Baltimore & Ohio R.R.,* 217 F.Supp. 252 (E.D. Pa. 1963); (d) cessation of rail services in a terminal in order to facilitate the construction of a new and different terminal which would provide alternative service, *Wheeling & Lake Erie Ry. Co.* v. *Pittsburgh,* 33 F.2d 390 (6th Cir. 1929); and (e) cessation of operations due to a lack of physical equipment arising from a proper repossession by a third party, *Zirn* v. *Hanover Bank, supra.**

The propriety of ceasing operations without administrative approval has been frequently upheld where necessary to the protection of constitutional rights. *Brooks-Scanlon Co.* v. *R.R. Commissioner La.,* 251 U.S. 396 (1920); *Bullock* v. *R.R. Commissioner of Fla.,* 254 U.S. 513 (1921); *R.R. Commissioner* v. *Eastern Texas Ry.,* 264 U.S. 79 (1924); *Erie R.R. Co.* v. *Pub. Util. Commission,* 254 U.S. 394 (1921); *Crawford* v. *Duluth Street Ry. Co.,* 50

* But see *Meyers* v. *Jay Street Connecting R.R.,* 259 F.2d 532 (2d Cir. 1958) where the Court sustained a preliminary injunction enjoining a financially impoverished railroad from ceasing operations without Commission approval, suggesting that the railroad could seek protection by petitioning for a reorganization under §77.

F.2d 213 (7th Cir. 1932); *State of Iowa* v. *Old Colony Trust,* 215 Fed. 307 (8th Cir. 1914); *In re Central Railroad Company of New Jersey,* 485 F.2d 208 at 215 and n. 42 (3d Cir. 1973). Also see *N.Y., N.H. & H.R. Co. Bondholders Committee* v. *United States,* 289 F.Supp. 418 at 441 (S.D.N.Y. 1968); *In re N.Y., N.H. & H.R. Co.,* 304 F.Supp. 793 at 804 (D.C. Conn. 1969). While the Special Court in *In re Penn Central Transportation Co.,* 384 F. Supp. 895, 918-920 (Special Court, RRRA, 1974), has suggested that the constitutional right to abandon loss operations is procedurally qualified by an obligation to seek approval from the pertinent administrative authority, it has also recognized that such qualification is inapplicable where the railroad has inadequate cash resources available both to pay the cost of operations and to permit an orderly liquidation. Thus, the Special Court stated at p. 919 fn. 31:

> We assume neither of the qualifications mentioned below could apply if, after all reasonable efforts, a reorganization trustee was faced with an imminent depletion of cash that would make it impossible for him to pay current bills for wages, supplies, interline balances, and similar expenses, and still leave an amount sufficient to permit an orderly liquidation.

Another instance of impossibility involves conflicting orders of Court and Commission.* If a court should di-

* While the present proceeding involves a general challenge to the Commission's regulations and does not specifically involve an instance of a court order in conflict with a Commission order, the reference here to a conflicting court order illustrates a particular type of instance in which intervening circumstances, beyond the control of the carrier involved, compel the cessation of operations—rendering nugatory Commission power and altering the nature of the carrier's duty.

rect a carrier not to operate; the present holding of the Court of Appeals would, nevertheless, recognize Commission power to direct operations to continue. Such a notion, *i.e.*, that the Commission may require a railroad to continue operations in the face of a final court order to the contrary, creates a power in our administrative agencies unanticipated by and intolerable to our rule of law, *Marbury* v. *Madison,* 1 Cranch 137 (1803), and places such railroad in a position of having to comply with conflicting decrees. Congress, however, avoided the problem of possible conflicting decrees when it enacted 49 U.S.C. §1(16)(b) for it did not authorize the Commission to override a court order and direct continuing operations; rather it specifically empowered the Commission to place another carrier on the property. The holding of the Court of Appeals in this case sows the seeds of future mischief because it creates, by judicial decision, the very problem which Congress avoided when it enacted 49 U.S.C. §1(16)(b).

We contend that the foregoing establishes beyond question that where a railroad ceases operations pursuant to a court order; or because it has run out of the cash necessary to meet payroll and other expenses of operations; or where it is necessary to protect the constitutional rights of the parties involved; or where other factors make continued operations impossible; such railroad has no continuing duty to do the impossible, and the Commission has no errant power to compel the impossible. The Court of Appeals' holding to the contrary is clear error and the regulation posited upon the existence of such continuing duty and power should be set aside.

The third condition enumerated in 49 U.S.C. §1(16)(b) to justify a directed service operation, *i.e.*, operating losses (which term, when read in the context of the constitutional decisions of this Court, *e.g., Brooks-Scanlon Co.* v. *R.R. Commissioner of La., supra,* must mean operating losses for which there is no foreseeable likelihood of recapture or of being compensated), does not necessarily involve the impossibility of a carrier's being able to provide service. The Court of Appeals' analysis of the Commission's power to require continued service without effecting a taking focused only on this uncompensated operating loss factor—in effect, an "erosion of assets" analysis. We respectfully submit that the Court's analysis and conclusion are wholly unsupportable and are based upon an erroneous reading of the *New Haven Inclusion Cases,* 399 U.S. 392 (1970) and its failure to take into account the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974); *In re Third Avenue Transit Corp.,* 198 F.2d 703 (2d Cir. 1953); and the line of cases following *Third Avenue Transit**.

We respectfully submit that the Court of Appeals erroneously construed the *New Haven Inclusion Cases* as establishing the unjustifiable proposition that a railroad may be made to suffer interim losses—even though prospectively perceived as unrecoverable—for a reasonable time without effecting a taking of its property (Slip opinion, p. 21, 22; App. 21a, 22a). In doing so, the Court totally ignored the need for the presence of at least one of two alternative "safety valves" to justify the requirement of continued interim loss operations in a given case; *i.e.*, the availability of a Tucker Act remedy to compensate for such loss, *Regional Rail Reorganization Act Cases, supra,* or the ability to make "Third Avenue" type findings at

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*See *The Central Railroad Company of New Jersey* v. *Manufacturers Hanover Trust Company,* 421 F.2d 604 (3d Cir. 1970); *In re Penn Central Transportation Company* (Columbus Options), 494 F.2d 270 (3rd Cir.) *cert. den.* 419 U.S. 883 (1974).

the time the continued operations are ordered, which provide at least reasonable assurance that future events will allow for the recapture of the losses. The *Third Avenue* case stands for the proposition that before erosion will be permitted to continue in the future, certain findings must be made which provide reasonable assurances to the parties involved that the benefits of a future reorganization or other disposition will compensate for the interim loss. A creditor's hand may be stayed to permit the reorganization process to unfold, since such unfolding will likely protect the creditor involved, as well as junior interests. The *Regional Rail Reorganization Act Cases* stand for the proposition that the Tucker Act remedy provides a full and sufficient substitute for such findings—in a sense giving to the stayed creditor greater assurances than do the findings. See *In re Penn Central Transportation Co.* (Appeal of Smith), 508 F.2d 270 (3d Cir. 1975). Under *Third Avenue,* the creditor must pray that the "findings" prove out; if not, so be it. Under the *Regional Rail Reorganization Act Cases,* further prayer is unnecessary. Accordingly, we contend that the *Third Avenue* line of cases establish that a railroad may be required to continue to operate at a loss without effecting a taking of its property only if the necessary "findings" can be made providing adequate assurance of recapture. Otherwise, such continued loss operations constitute a taking within the meaning of the Fifth Amendment, but, under the *Regional Rail Reorganization Act Cases,* such loss operations will be permitted if a Tucker Act remedy is available to compensate the owner for that taking.

The holding in the *New Haven Inclusion Cases* is not to the contrary. The *New Haven Inclusion Cases* involved the balancing of issues of fairness and equity between two private parties in determining the amount that the Penn Central would be required to pay for the assets

of the New Haven. The New Haven bondholders claimed that the Penn Central should compensate it for the losses incurred from the inception of the reorganization to the time of inclusion. This Court underscored the facts that the bondholders had not shown what the losses attributable to the prevaluation period were and that no bondholder had petitioned for dismissal of the proceeding until after the valuation date.* This Court further noted that from the inception of the New Haven proceeding, it had been recognized that a merger with a large trunk line was the proper solution for the New Haven estate—a determination which, in effect, filled the requirement of the *Third Avenue* findings. The fact that it was there *retrospectively* considered not fair and equitable to saddle the Penn Central with the amount of the ensuing erosion for purposes of valuation of assets does not constitute a holding that some or any erosion—prospectively foreseen as not subject to recapture—is permissible and does not constitute a Fifth Amendment taking. The case does not speak to, or foreclose, the question of whether the public must compensate for erosion knowingly imposed upon a railroad through continued operations for a public purpose. Therefore, the *New Haven Inclusion Cases* opinion

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* In this regard see *In re Penn Central Transportation Company* (Columbus Options), *supra,* 279-282. There, Judge Gibbons, speaking for the Court of Appeals for the Third Circuit, noted this Court's statement in the *New Haven Inclusion Cases* that the bondholders had acquiesced in continuing the proceedings rather than moving for liquidation and also stated the issue of the ". . . constitutionality of the erosion which had taken place prior to the valuation date was never presented to the court in any proceeding in which it could have passed upon that issue." Judge Gibbons then concluded that "The *New Haven Inclusion Cases* decided no more than that Penn Central does not have to pay for erosion which took place prior to its purchase of the assets.

does not conclude the issues raised here, and the Court of Appeals erred in concluding that that opinion dictates the holding that directed service under 49 U.S.C. §1(16)(b) does not constitute a taking within the meaning of the Fifth Amendment. (Slip opinion, p. 23; App. 23a). We, therefore, ask this Court to grant *certiorari* to determine whether directed service operations under 49 U.S.C. §1(16)(b) constitute a taking of the other carrier's property within the meaning of the Fifth Amendment.

POINT III

The Court of Appeals' holding that the taking of possession of the other carrier's property during a directed service operation does not constitute a taking within the meaning of the final clause of the Fifth Amendment involves an important, unresolved issue of federal law which should be settled by this Court as to whether, and in what circumstances, the government may take actual physical possession of an owner's property for a public use without such actual taking constituting a taking within the meaning of the Fifth Amendment.

The Court of Appeals, having first concluded that a railroad may be required to continue loss operations without effecting a taking of its property, then concluded that the distinction between requring such continued operations, on the one hand, and ordering directed service operations by another carrier, on the other, is formalistic and does not require a ". . . holding here that the latter constitutes a taking but the former does not." (Slip opinion, p. 24; App. 24a). The Court went on to state:

> It might be anomalous indeed if the ICC could order forced deficit operations by a railroad and not effect a taking, but could not order another carrier to discharge those same duties, thereby in the usual case saving that railroad operating costs, without such action constituting a taking. (id).

In Point II, *supra,* we have shown that the Court of Appeals' underlying premise, *i.e.*—that continued loss operations may, without exception, be required without effecting a taking of property, is erroneous. Thus, the Court's further conclusion that the substitution of possession of one carrier for the owning carrier is likewise not a taking, must also be wrong. However, even assuming *arguendo* that the Court of Appeals was correct in its underlying premise, we, nevertheless, contend that the substitution of possession of one carrier for the owning carrier is not a formalistic distinction but constitutes a taking within the meaning of the Fifth Amendment.*

The concept of possession and control is at the heart of the Anglo-American property law jurisprudence, and the plain meaning of the word "taken" in the Fifth Amendment must be read as having reference to such jurisprudence. Indeed, the tension in our constitutional doctrine between a taking, on the one hand, and merely a harsh regulation on the other, has traditionally centered on the issue of what governmental conduct, short of an actual interference with possession and control, should be regarded as a taking rather than a regulation because of

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* We believe the Court of Appeals, while recognizing the distinction between an "erosion taking" and a "conveyance taking", *Regional Rail Reorganization Act Cases, supra,* (See Slip opinion, pp. 23, 24; App. 23a, 24a), gave insufficient weight to that distinction in reaching its conclusion.

the substantial deprivation of the use and benefit of the property involved. The essence of regulation is the control over the manner in which an owner uses his property, while the essence of a taking is the deprivation of such use. The Court of Appeals has moved the center of tension to a new and unexplored frontier—far beyond the point that divided this Court in *National Board of YMCA* v. *United States,* 395 U.S. 85 (1969)—with the relevant question now becoming which planned physical takings for the benefit of the public are not legal takings.* In *National Board of YMCA,* a case denying compensation for damages to private buildings while occupied by the Army during a riot in the Canal Zone, the Court divided over a fact question, i.e.—whether the occupation was spontaneous and primarily in defense of the buildings, or whether it was specifically for shelter and use as a fortress from which to seal off the Canal Zone border. From the opinions it appears that all of the Justices were in agreement that had the occupation been part of a planned use of the building as a fortress in a riot situation, a taking would have been effected within the meaning of the Fifth Amendment. *A fortiori,* the planned taking of possession of the other carrier's property for a public use during a directed service operation must be a taking within the intention of the Fifth Amendment.

Upon analysis, all of the elements of a taking within the meaning of the Fifth Amendment are present. Directed service necessarily transfers the right of possession and control from the owning carrier to the directed carrier. This transfer is admittedly for an important

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* We respectfully submit that in so doing the Court of Appeals was significantly influenced by the judgment that the L&NE had not been injured—a matter which we have never litigated, nor in fairness, have had the opportunity to litigate

public use, *i.e.*—the continued provision of rail service over the owning carrier's lines. That such use is temporary, and conducted by a private carrier at the Commission's order rather than by the government itself, is of no constitutional significance, see *United States* v. *Peewee Coal Co.,* 341 U.S. 114 (1951); *Kimball Laundry Co.* v. *U.S.,* 338 U.S. 1 (1949); *International Paper Co.* v. *United States,* 282 U.S. 399 (1931); *R. D. Widen Co.* v. *U.S.,* 357 F.2d 988 (Ct. of Cl. 1966); *Eyherabide* v. *U.S.,* 345 F.2d 565 (Ct. of Cl. 1965); *Wheelock Bros.* v. *U.S.,* 88 F.Supp. 278 (Ct. of Cl. 1950), vacated on other grounds, 341 U.S. 319 (1951); *Niagara Falls Bridge Commission* v. *U.S.,* 76 F.Supp. 1018 (Ct. of Cl. 1948); *American-Hawaiian S.S. Co.* v. *U.S.,* 124 F.Supp. 378 (Ct. of Cl. 1954), *cert. den.,* 350 U.S. 863 (1955).

In view of the foregoing, the decision of the Court of Appeals must be read to mean that action which would otherwise constitute a taking of property within the meaning of the Fifth Amendment, does not constitute such a taking where the property belongs to a carrier which, because of regulation, is required to provide service and fails to do so. We submit, however, that neither the fact that the carrier is under a duty to provide service, nor its failure or inability to provide such service, removes the carrier or its property from the protection afforded by the Fifth Amendment when that property is seized by the government and used in the public interest. See *North Carolina Railroad Company* v. *Lee,* 260 U.S. 16 (1922) where Justice Brandeis stated that the government's operation of the railroads during World War I under the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451. was. ". . . under a right in the nature of eminent domain"; and *Northern Pacific Railroad Company* v. *North Dakota,* 250 U.S. 135 (1919) in which decision it was implicit that the government seizure of the railroads during

World War I constituted a compensable taking of property. See also, *Wheelock Bros.* v. *United States, supra,* where the business of plaintiff, an ICC regulated motor carrier, was seized by the government and temporarily operated by plaintiff's management under government control. The Court of Claims held this action to constitute a compensable taking of property within the meaning of the Fifth Amendment.

The consequence of the decision below is to declare a judicial forfeiture of property rights—unauthorized by Congress. Valid forfeitures are created by statute, which, being penal in nature, must be strictly construed. *Stapleton* v. *$2,438,110,* 454 F.2d 1210, 1216 (3d Cir. 1972) *cert. denied,* 409 U.S. 894. Courts look with disfavor on forfeitures, and absent a clear statutory basis, will not lightly ascribe to Congress the intention to create a forfeiture, *King* v. *United States,* 364 F.2d 235 (5th Cir. 1966); *Baca* v. *C.I.R.,* 326 F.2d 189 (5th Cir. 1964); *Warner* v. *United States,* 201 F.2d 327 (Ct. Cl. 1962). Nothing in 49 U.S.C. §1(16)(b) indicates that Congress intends a forfeiture to result from a directed service operation; such forfeiture should not be created by judicial decision. We therefore ask the Court to grant certiorari to decide the issue of whether, and in what circumstances, an actual Governmental taking for a public use is not a taking within the intention of the Fifth Amendment.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgments and opinion of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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October, 1976

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1518

LEHIGH AND NEW ENGLAND RAILWAY COMPANY,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES,

Respondents,

COMMONWEALTH OF PENNSYLVANIA,

Intervenor

ON PETITION FOR REVIEW OF ORDER OF INTERSTATE COMMERCE COMMISSION

Argued February 24, 1976
Before ADAMS, HUNTER and GARTH, *Circuit Judges*

Carpenter, Bennett & Morrissey
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Appendix A

OPINION OF THE COURT

(Filed June 9, 1976)

HUNTER, *Circuit Judge:*

The Lehigh and New England Railway Company ("L&NE") petitions this court to review and set aside an order of the Interstate Commerce Commission ("ICC") entered in Ex Parte No. 293 (Sub-No. 3), entitled "Submission of Cost Data to Justify Reimbursement," and cost form regulations, 49 C.F.R. § 1126, promulgated by that order.[1] The regulations sought to implement section 1(16)(b) of the Interstate Commerce Act, 49 U.S.C. § 1(16)(b) (Supp. IV, 1974), which permits the Commission, in certain specified instances, to direct a railroad carrier to operate temporarily over the lines of another carrier unable or unwilling to provide essential rail service. L&NE challenges the regulations insofar as they fail to provide for the payment of rent, except in certain limited circumstances, to the railroad unable or unwilling to continue service for the use of its properties by the carrier directed by the ICC to operate temporarily on those properties. The Commonwealth of Pennsylvania has intervened in general support of the regulations. For the reasons set forth below, we deny L&NE's petition to review and set aside the regulations.

I.

A. *Section 1(16)(b) and the Cost Reimbursement Regulations*

Section 1(16)(b) of the Interstate Commerce Act, 49 U.S.C. § 1(16)(b),[2] grants the ICC emergency authority

1. We have jurisdiction to review the Commission's regulations by virtue of 28 U.S.C. §§ 2321(a), 2342(5) (Supp. IV, 1974).

2. Section 1(16)(b) provides:

(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

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to make just and reasonable directions with respect to the handling, routing and movement of traffic available to a railroad carrier that is unable to transport the traffic of-

2. (Cont'd.)

(1) its cash position makes its continuing operation impossible;
(2) it has been ordered to discontinue any service by a court; or
(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing, and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

(A) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days.

(B) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

(C) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

(D) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier, and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

(E) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has exceeded said revenues. The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.

fered it because (1) its cash position makes continued operation impossible, (2) it has been ordered by a court to discontinue service or (3) it has abandoned service without prior Commission approval. Specifically, the ICC may direct a carrier (hereinafter the "directed carrier") to operate over the lines of the carrier unable to transport its own traffic (hereinafter the "other carrier"). The duration of this directed service is specifically limited to 60 days, unless extended by the ICC for cause shown for an additional period not to exceed 180 days. 49 U.S.C. § 1(16)(b) (A).

Subsection (b) was added to section 1(16) of the Interstate Commerce Act by section 601(e) of the Regional Rail Reorganization Act of 1973 ("Rail Act").[3] The legislative history of the Rail Act has been extensively documented by other courts and will not be reviewed here.[4] It is sufficient to state that the Act was a congressional attempt to provide imaginative and innovative solutions to avoid a national disaster threatened by the bankruptcy of railroads in Northeastern United States. Subsection (b) was considered necessary to ensure that essential rail service provided by the bankrupt carriers in the Northeast would be continued pending development and implementation of a longer term reorganization of the bankrupt lines.[5]

3. 87 Stat. 986, 1021. Prior to the addition of subsection (b), section 1(16) did not specifically authorize the ICC to direct a carrier to operate over the lines of another carrier that was unable to transport the traffic offered it.

4. *See, e.g.*, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), Connecticut General Ins. Corp. v. United States Railway Ass'n, 383 F. Supp. 510 (E.D. Pa.) (three-judge court), *rev'd*, 419 U.S. 102 (1974); *In re* Penn Central Transportation Co., 384 F. Supp. 895 (Regional Rail Reorganization Act Special Court 1974).

5. The Senate Report accompanying the Rail Act stated:

> The purpose of subsection (e) is to assure the continuance of essential rail service in the Northeast and Midwest region in case one or more of the seven railroads presently in reorganization under section 77 of the Bankruptcy Act ceases operations prior to the adoption, approval, and implementation of the final system plan. By authorizing the Commission to direct a carrier to operate over the lines of a non-operating carrier for an interim period, transportation chaos and economic disaster can be avoided while the planning and implementation process provided for in the bill moves forward in a careful and orderly manner.

S. REP. No. 93-601, 93d Cong., 1st Sess. 52-53 (1973), *reprinted in* 2 U.S. CODE CONG. & ADMIN. NEWS 3242 (1974).

Section 1(16)(b)(E) permits the directed carrier to recover from the government, upon request, a sum equal to the amount by which the cost of directed operations exceeds the revenues derived from that operation. "Cost" is defined by subsection (E) as "those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit." The subsection requires the ICC to prescribe a form on which the directed carrier can record costs and revenues of the directed operation and which must then be submitted by the directed carrier to the Commission for audit. The ICC then is authorized to certify to the Secretary of Treasury the amount of payment to be made to the directed carrier.

In an effort to implement section 1(16)(b), the ICC issued on April 9, 1975, effective March 21, 1975,[6] a form for the recordation of costs and revenues by the directed carrier, rules governing the procedure for submission of cost data, and a report setting forth the Commission's policy on what costs and revenues, incurred in or attributable to the conduct of directed operations, are allowable for purposes of inclusion in the cost form.[7] ICC viewed its role under section 1(16)(b) as follows:

6. The ICC had commenced a rulemaking proceeding known as Ex Parte No. 293 (Sub-No. 3) on July 11, 1974 for the purpose of promulgating the cost form and regulations. Representatives of the railroad industry, including the Central Railroad Company of New Jersey ("CNJ") but not L&NE, shippers and labor participated in the proceedings.

7. The cost form and rules, but not the report, are found in 49 C.F.R. § 1126. The ICC report, "Implementation of Public Law 93-236, Section 601(e), Regional Rail Reorganization Act of 1973—Submission of Cost Data to Justify Reimbursement," ("Report") appears at 348 I.C.C. 251 & 320 (1975). The relationship of the Report to the cost form was stated by the ICC as follows:

> The comments and discussions in the report and order of the Commission accompanying this cost form, while not an integral part of the cost form itself, shall be used by a directed carrier applying the cost form as guidance in recording revenues and expenses and as a general statement of Commission policy, subject to revision, regarding emergency directed service under section 1(16)(b) of the Interstate Commerce Act, as amended by section 601(e) of the Regional Rail Reorganization Act of 1973. ICC Report, Joint App. at A-199.

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The Commission views its role as that of mediator between the directed carrier and the other carrier in terms of charges to which they must mutually agree and as that of overseer of the general reasonableness of expenses incurred in performance of a directed operation, and hopes that, with the cooperation of all parties, it can maintain that limited role. The standards established in the final cost form are intended to simplify and standardize the admittedly complex accounting procedures imposed upon a directed carrier and to limit those expenditures which may be reimbursable by the Federal government to those essential to performance of a directed service within the guidelines established by section 1(16)(b) itself and within the clear intent of Congress to keep Federal expenditures to a minimum.[8]

As is pertinent to the instant controversy, in its Report the ICC considered the question whether it should recognize rent paid by the directed carrier to the other carrier for use of its facilities as a reimbursable cost under section 1(16)(b). The Commission concluded that in the usual case, where the directed carrier's costs of directed operations exceeded revenues, no compensation or rent for the use of the other carrier's lines and facilities would be required and thus a directed carrier would not be reimbursed by the government for any rent paid to the other carrier.[9] The practical effect of this rule is to deny the other carrier rent for the use of its lines and facilities

7. (Cont'd.)
All references in this opinion to "cost reimbursement regulations" include the cost form, its regulations and the Report. All citations to the Report are to the Joint Appendix of Petitioner.

8. ICC Report, Joint App. at A-165 to -166.

9. *Id.* at A-173 to -174. The Commission further stated, however, that where "rental agreements already exist under which the other carrier leases lines or properties, . . . for its operations, the directed carrier shall pay the existing rental for those lines and other properties which are necessary to the performance of a directed operation, and such payments shall be recognized as a reimbursable cost. . . ." *Id.* at A-170.

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during the period of an unprofitable directed operation. Where the costs of directed operations do not exceed revenues, i.e., a profitable operation, the Report provides that rent should be paid to the other carrier by the directed carrier. In this event, the amount of rent would be measured by the lessening of the other carrier's economic value due to the directed operations (i.e., normalized depreciation), reduced by amounts expended during the period of directed service that benefited the other carrier or its estate.[10]

The Commission stated two reasons for its denial of rent to the other carrier in the usual case. First, it believed that by ordering directed service it was fulfilling the other carrier's legal obligation to continue service until obtaining a certificate of abandonment from the ICC and that to permit reimbursement for rent would provide a monetary incentive for the "unlawful abandonment of service." Second, the Commission was of the view that its ordering of directed service would confer substantial benefits on the other carrier which in most instances would be sufficient to discharge any obligation to pay rent.[11]

L&NE instituted these proceedings on May 20, 1975 to set aside that portion of the ICC's cost reimbursement regulations which denies rent to the other carrier when directed operations are not profitable.

B. *Service Orders 1207 & 1208*

L&NE's interest in the Commission's refusal to reimburse a directed carrier, in the usual case, for rent paid the other carrier during the period of directed service can be traced to two orders issued by the ICC, Service Orders 1207 and 1208. A review of events leading up to and surrounding the issuance of these orders, which directed the Reading Company and the Lehigh Valley Railroad Company ("LVRR") to operate for a limited period of time

10. *Id.* at A-174 to -175.

11. *Id.* at A-171 to -174, see notes 28 & 29, *infra*.

over the lines of L&NE, is necessary to an understanding of the instant controversy.[12]

L&NE is a carrier by railroad whose lines are located solely within the Commonwealth of Pennsylvania.[13] In 1972, L&NE, because of a decrease in coal and cement traffic, experienced a substantial decline in net income and by 1973 it was operating at an annual deficit of over $100,000.[14] Because of these losses, representatives of L&NE and CNJ allegedly approached the ICC in the latter part of December 1974 to determine whether the Commission would be willing to enter an order directing another railroad to provide service over L&NE's lines.[15] L&NE indicated that according to its projections for 1975 operating losses ranging up to as much as $400,000 might be expected for the first six to nine months of 1975. L&NE further indicated its intention to embargo all traffic to,

12. This action was instituted by L&NE, as it candidly admits, primarily to clear the way for a suit against the United States in the Court of Claims based on L&NE's contention that Service Orders 1207 and 1208 constituted a taking of L&NE's property for which just compensation is required. L&NE brought the instant proceeding first because it feared that the Court of Claims might view L&NE's suit for just compensation as a collateral attack on the ICC regulation. Brief for Petitioner at 15 n.*. We, of course, express no opinion as to the effect of our decision on any action that might be instituted in the Court of Claims.

13. L&NE was formed in 1961 as a wholly owned subsidiary of the Central Railroad Company of New Jersey ("CNJ"). Following a default by CNJ of certain loans guaranteed by the ICC, all L&NE stock, bonds and equipment were transferred to, and registered in the name of, the United States. Nevertheless, the CNJ Trustee continues to vote the L&NE stock and manage the L&NE on a day-to-day basis without supervision by the United States Department of Justice.

The recent conveyance of certain railroads in the Northeast and Midwest on April 1, 1976 to ConRail under the "Final System Plan" adopted pursuant to the Rail Act has had no effect on the instant litigation. While the implementation of the Final System Plan resulted in a transfer of certain assets of L&NE to ConRail, L&NE's corporate status remains unmodified. In addition, ConRail did not acquire the stock of L&NE and L&NE's corporate relationship both to CNJ and to the United States has remained unaffected.

14. *In re* Application of Lehigh and New England Railway Company, Under Section 1, Paragraphs (18) to (20), Inclusive, of the Interstate Commerce Act, as Amended, For a Certificate of Public Convenience and Necessity Authorizing Abandonment of Operations, at 10 & Exhibit 2b, (filed Sept. 8, 1975), *reprinted in* Exhibit I to Brief of Respondent.

15. L&NE disputes the government's assertion that it solicited or requested the Commission to order directed service. Letter from Carpenter, Bennett & Morrissey to Thomas F. Quinn, Clerk of the United States Court of Appeals for the Third Circuit, at 2, Apr. 8, 1976.

from and over its lines, effective January 24, 1975. Brief for Respondent at 21.

During meetings in December and in the early part of January various alternatives to directed service were discussed by the ICC, L&NE and shippers in L&NE's area, but no solution was reached. On January 7, 1975, L&NE issued an embargo covering all traffic moving from, to and over its lines, effective January 24, 1975. To avoid the disruption that would result from implementation of the embargo, the ICC entered Service Orders 1207 and 1208 on January 17, 1975, which directed LVRR and Reading to provide service over L&NE's lines for 60 days (from January 24 to March 24, 1975). The service orders were subsequently extended for an additional 180 days (from March 24 to September 21, 1975) by the Commission after being notified on March 3, 1975 that L&NE would not be able to resume operations upon the expiration of the original service orders.[16]

The Service Orders required the directed carriers, LVRR and Reading, and L&NE "to negotiate . . . agreement[s] . . . on all aspects of the directed operation subject to their determination," and subject to Commission approval.[17] During these negotiations, L&NE sought to be paid rent for the use of its facilities during the period of directed service. Negotiations broke down after the ICC advised the parties that no basis had been shown for allowing rent to L&NE. Shortly thereafter, the instant proceeding was commenced by L&NE.

On September 9, 1975, immediately prior to the expiration of Service Orders 1207 and 1208 as extended,

16. L&NE sent copies of its letter to the ICC to all shippers and receivers of freight in the area with the suggestion that "[i]f the continuation of these services is essential to your company, I would suggest that you get in touch with Mr. Brooks [at the ICC] . . . and urge that the Interstate Commerce Commission extend the termination dates." Brief for Respondent at 25. Apparently, these shippers followed L&NE's advice and contacted the ICC to demonstrate their need for continued rail services. *Id.*

17. Corrected Revised Service Orders 1207 & 1208, *reprinted in* Brief of Petitioner, Exhibits I & II, at 5.

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L&NE filed for the first time an "Application for Authority to Abandon Operations." Thereafter, an agreement was reached between L&NE and LVRR and Reading whereby the two carriers would continue to provide service over L&NE's lines "on a 'no-loss guaranty basis.'" The agreement was underwritten by funds provided by the United States Department of Transportation under section 213 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 723 (Supp. IV, 1974).

In November of 1975, LVRR and Reading submitted claims for reimbursement of costs in excess of revenues that resulted from the directed operations under Service Orders 1207 and 1208. The amounts claimed reflected total operating losses of $325,891.15, of which $120,372.88 consisted of maintenance of way expenses required to permit safe operations over L&NE's properties.[18] Brief for Respondent at 26.

II.

L&NE makes several arguments in support of its petition to set aside the Commission's regulations regarding reimbursement for rent charged by the other carrier. First, it contends that the ICC exceeded its rulemaking authority under section 1(16)(b) by determining what costs are reimbursable because that section authorizes the Commission only to prescribe a form for recordation of costs as defined in section 1(16)(b) and does not grant it authority to make substantive rules. Second, L&NE asserts that directed service constitutes a taking of property for a public use within the meaning of the fifth amendment and that the Commission's rules concerning reimbursement for rent deprive the other carrier of the just compensation to which it is entitled under the fifth amend-

18. In addition $51,232.51 was expended by LVRR, with prior ICC approval, to rehabilitate L&NE's tracks to conform them to safe operating standards.

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ment.[19] As a subsidiary argument, L&NE claims that by adopting a rule that rent is payable only where the directed service is profitable, the ICC has usurped the judicial function of determining what constitutes just compensation. Finally, L&NE attacks as arbitrary and capricious the regulations' distinction between profitable and unprofitable operations for payment of rent and the method of calculating the amount of rent to be paid in the event of a profitable operation.

The Commission contends first that L&NE is equitably estopped from attacking Service Orders 1207 and 1208 as constituting a taking and the cost reimbursement regulations as providing inadequate compensation because L&NE sought and obtained substantial benefits from the directed operations. The authority to adopt regulations determining what expenditures constitute reimbursable costs under section 1(16)(b) is found, the Commission asserts, both in its inherent power to supervise the flow of federal funds to railroads and in the preamble to the Rail Act, in which Congress expressed its desire to provide federal assistance to railroads at the lowest possible cost to the general taxpayer. 45 U.S.C. § 701(b)(6) (Supp. IV, 1974). The ICC disputes L&NE's assertion that directed service effects a taking under the fifth amendment; it contends that by ordering directed service the Commission is merely fulfilling the other carrier's obligation to continue rail service until receiving a certificate of abandonment and that in the usual case the other carrier receives substantial benefits as a result of directed service,[20] which benefits consti-

19. L&NE does not challenge the constitutionality of either directed service under section 1(16)(b) or Service Orders 1207 and 1208. Reply Brief for Petitioner at 3. Nor does L&NE ask this court to determine the amount of compensation to which it is entitled should we conclude that directed service constitutes a taking within the meaning of the fifth amendment; L&NE has stated that it will bring suit in the Court of Claims to resolve this question. See note 12 *supra*.

20. The benefits perceived by the ICC to have flowed to L&NE as a result of directed service are: (1) L&NE was relieved of further operating losses during this period; (2) its rail properties were prevented from further deterioration; (3) its properties were upgraded to safe operating standards; (4)

tute just compensation as a matter of law. Finally, the ICC asserts that L&NE lacks standing to challenge those portions of the regulations concerning the payment of rent in the event of a profitable operation because such a situation is only a hypothetical one and because there is currently pending before the Commission a challenge to those portions of the regulations.

III.

A. *Equitable Estoppel*

The Commission argues that L&NE cannot now be permitted to attack the cost reimbursement regulations because it actively sought directed service and still retains substantial benefits resulting from the directed operations. In support of its argument, the ICC quotes a statement by the Supreme Court in *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 502 (1955) that a plaintiff "cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits."[21]

On the record before us, we cannot rely on the estoppel doctrine to avoid reaching the difficult issues raised in L&NE's petition. *FPC* is inapposite. In that case the party which sought the merger was aware prior to accepting the merger's benefits of the conditions imposed on the merger by the government.[22] There is no evidence in the record that prior to accepting directed service, L&NE was aware that it would not receive compensation for the

20. (Cont'd.)
directed service led directly to agreements between L&NE and LVRR and Reading to continue service over L&NE's lines; and (5) directed service facilitated inclusion of L&NE's properties in the Final System Plan. Brief for Respondent at 40-41.

21. *See also* Irregular Route Carriers Ass'n v. United States, Civil No. 4-72214 (E.D. Mich. Sept. 5, 1974) (three-judge court) (oral opinion), Exhibit II of Brief of Respondent; Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (D. Colo. 1971) (three-judge court), *aff'd per curiam*, 404 U.S. 802 (1972).

22. 348 U.S. at 502.

directed carrier's use of its properties. The service orders were issued on January 17, 1975 and extended on March 21, 1975, but the ICC did not issue its cost form regulations and report until April 9, 1975, effective March 21, 1975. In addition, paragraph (i) of each service order provided that the directed carrier and L&NE were to negotiate an agreement "on all aspects of the directed operation subject to their determination, including, but not limited to . . . rental for the use of rights-of-way and other rail facilities."[23] Finally, L&NE disputes the ICC's assertion that it sought or requested directed service.[24]

B. *ICC Authority to Determine Reimbursable Costs*

The ICC, like other administrative agencies, is of course a creature of statute and cannot exceed the specific statutory authority granted it by Congress.[25] While the precise wording of section 1(16)(b)(E) could be construed, as L&NE asserts, to grant the Commission only the ministerial duty to prescribe a mere form for the recordation of cost and revenue figures, we reject such a narrow view of ICC authority here. In our view, the Commission's authority to determine what are reimbursable costs, while not explicitly set forth in the Rail Act or section 1(16)(b), is fairly implied, assuming a reasonable exercise of that authority. *See American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1037 (3d Cir. 1975); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967); *Akron, Canton & Youngstown R.R. v. United States*, 370 F. Supp. 1231, 1235-36 (D. Md. 1974) (three-judge court). We consider a reading of section 1(16)(b) to limit Commission power in determining reimbursable costs to be unwarranted absent compelling evidence that such was Congress's

23. Corrected Revised Service Orders 1207 & 1208, Brief for Petitioner, Exhibits I & II, at 5.

24. See note 15 *supra*.

25. American Trucking Ass'ns, Inc. v. United States, 242 F. Supp. 597, 600 (D. D.C. 1965) (three-judge court), *aff'd* 382 U.S. 373 (1966). *See generally* Zuber v. Allen, 396 U.S. 168 (1969); CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961); Reardon v. United States, 491 F.2d 822 (10th Cir. 1974).

intent. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968); *American Trucking Associations, Inc., v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 409-12 (1967).

In support of our conclusion, we note that the Commission is given the authority in section 1(16)(b)(E) to "audit" the costs incurred and revenues obtained by the directed carrier and to certify to the Secretary of the Treasury the amount of payment due the carrier. We interpret these grants of authority to require the ICC to do more than merely check to see that the particular amounts recorded actually were expended or received by the carrier. Rather, in our view, it has a duty to determine that the amounts expended by the directed carrier were the type of expenditures for which Congress intended the carrier to receive reimbursement.

Even more importantly, we note that the preamble to the Rail Act declares Congress' intention to provide for "necessary Federal financial assistance [for essential rail service] at the lowest possible cost to the general taxpayer." 45 U.S.C. § 701(b)(6) (Supp. IV, 1974). This court has recently stated that "[w]e read this language as an earnest entreaty to economize, addressed to those who are authorized to spend many millions, ultimately billions, of dollars in preserving and subsidizing essential rail service." *In re Penn Central Transportation Co.*, No. 75-1902, at 11 (3d Cir. Mar. 3, 1976).[26] This express Congressional policy would be undermined if the ICC was required to reimburse a directed carrier for every

26. We recognize that the directed service provision of the Rail Act was enacted as an amendment to the Interstate Commerce Act and that it has force and effect outside the context of the regional rail reorganization contemplated by the Rail Act. See note 3 *supra* and accompanying text. Nevertheless, we do not feel that the scope of administrative authority granted the Commission under section 1(16)(b) can be measured without consideration of the purposes for which this section was originally enacted—namely, to preserve essential rail service in the short-run, pending longer term regional rail reorganization. *Id.; see* Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968); United States v. Pennsylvania R.R., 323 U.S. 612, 618-19 (1945).

expenditure made in connection with directed service, regardless of its reasonableness. We agree with the Commission that "[i]t would be entirely unacceptable for all claimed costs, subject only to technical audit, to be paid without evaluation of their propriety."

L&NE argues that a preamble cannot confer powers on the Commission that are not conferred by the operative language of the statute.[27] But we have not concluded that the preamble to the Rail Act confers powers on the ICC not granted it in the operative language of the statute. Rather, we have merely used the preamble as a guide to aid us in determining the legitimate scope of the administrative authority that is clearly reposed in the Commission by the operative language of section 1(16)(b). In analogous situations, the Supreme Court has relied on the National Transportation Policy set forth in the preamble to the Interstate Commerce Act to determine the extent of authority granted the Commission in specific sections of that Act. *See, e.g., American Trucking Associations, Inc. v. Atchison, Topeka & Sante Fe Ry.*, 387 U.S. 397, 409-10 (1967); *United States v. Pennsylvania R.R.*, 323 U.S. 612, 618-19 (1945).

Finally, the Interstate Commerce Act and the Rail Act entrust a broad subject matter to administration by the ICC. Surely, the scope of the Commission's responsibilities under the Act requires a generous construction of its statutory authority. In deciding a question concerning the scope of Commission authority in a different context, a three-judge court in *Florida East Coast Ry. v. United States*, 259 F. Supp. 993, 997 (M.D. Fla. 1966), *aff'd* 386 U.S. 544 (1967) stated:

> No one who reviews the history and language of the Interstate Commerce Acts can doubt that Congress has entrusted the ICC with plenary power to regulate al-

27. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 289-90 (1936); Yazoo & Mississippi Valley R.R. v. Thomas, 132 U.S. 174, 188 (1889); Hughes Tool Co. v. Meier, 486 F.2d 593, 596 (10th Cir. 1973).

> most every aspect of the rail industry. . . . The ICC is in many ways a super-management often making managerial-type decisions affecting the transportation industry, with but one overriding duty—to protect the public interest.

We think these observations particularly applicable to the ICC's broad emergency power to order and regulate directed service under section 1(16)(b). *See also* 49 U.S.C. §§ 1(14)-(15).

Having concluded that the Commission has authority to determine what costs are reimbursable consistent with section 1(16)(b), does not, of course, mean that the exercise of that power here was proper. In section 1(16)(b)(E), Congress intended that the directed carrier be reimbursed for all reasonable expenses necessary to providing directed service. Thus, the Commission's rules denying reimbursement to the directed carrier for rent paid to the other carrier in the event of an unprofitable operation can only be upheld as a reasonable exercise of its authority if, as both a statutory and a constitutional matter, the directed carrier is not required to pay rent to the other carrier in that instance.

C. ICC's Construction of Section 1(16)(b)

While not specifically argued by L&NE, we must first determine whether the ICC's cost reimbursement regulations denying rent to the other carrier where the cost of directed operations exceeds revenue comport with Congress' intent in enacting section 1(16)(b). *See Hagans v. Lavine,* 415 U.S. 528, 543 (1974); *Allen v. Aytch,* No. 75-1924, at 6 (3d Cir. Apr. 29, 1976). In deciding this question we are mindful of the Supreme Court's statement in *Udall v. Tallman,* 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon,* 329 U.S. 143, 153. See also, *e.g., Gray v. Powell,* 314 U.S. 402; *Universal Battery Co. v. United States,* 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co. v. Electricians,* 367 U.S. 396, 408.

See also Lucas Coal Co. v. Interior Board of Mine Operations Appeals, 522 F.2d 581, 584 (3d Cir. 1975).

The statutory language of section 1(16)(b)(E) does not specifically provide for the payment of any monies to the other carrier; rather, it requires a payment solely to the directed carrier of the costs incurred in performing the directed service. "Cost" is defined as follows:

> The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit.

Thus, the ICC concluded that if rent for use of the other carrier's properties were to qualify as a "cost," it must result from the inference that such rent is an expenditure to be "incurred" by the directed carrier. The Commission rejected such an inference based on its views that it was highly unlikely that Congress intended to provide a

monetary incentive to the other carrier to abandon rail service without prior ICC approval,[28] and that the other carrier would derive substantial benefits from directed service so as to render compensation in the form of rent unnecessary as a matter of law in the case where costs exceeded revenues.[29]

The ICC has given careful consideration to this question. We cannot say that its interpretation of section 1(16)(b) is unreasonable so long as the interpretation does not contravene the fifth amendment—the L&NE conten-

28. The Commission's reasoning was stated in its Report as follows:

> Under the Interstate Commerce Act, all common carriers by railroad must fulfill their common carrier obligation to continue service to the public (Section 1(4)), unless and until a certificate of abandonment is authorized by the Commission pursuant to the provisions of section 1(18) of the Act. Under the requirements of section 1(16)(b), in order for the Commission to issue a directed service order, the operated carrier, having ceased operations without obtaining a certificate of abandonment from the Commission, must be in dereliction of its statutory duty to continue to provide such service. *Smith v. Hoboken R. Co.*, 328 U.S. 123, 130 (1946). It is highly unlikely that Congress in its consideration of section 1(16)(b) desired to provide a monetary incentive for the unlawful abandonment of rail service. Rewarding a railroad for avoiding such a legal obligation would be contrary to public policy.

ICC Report, *supra* note 7, Joint App. at A-172.

29. The Report continued:

> Whatever consideration is given to the economic loss of the operated carrier because of the ordering of directed service over its properties must be balanced by a consideration of the benefits conferred by such an order. First, the carrier avoids incurring any additional operating losses which might impair the interests of its creditors or further erode its invested capital. Further, during the period of the directed service, the property will be maintained in order to continue service and all employee obligations for those employees hired by the directed carrier will be satisfid. Consequently, in ordering directed service, the Commission both fulfills the carrier's legal obligation to continue to provide service and preserves the value that the operated properties might have for continued use in their dedicated purpose.

Id. at A-173.

> Additionally, since the authority to abandon the rail properties has not yet been approved, the carrier cannot legally convert the capital it has invested in the property to a non-rail use. Until such an abandonment is approved, these assets would be unutilized and thus be subject to deterioration since the carrier has no funds available either to continue operations or maintain its properties. The defaulting carrier, in most foreseeable situations, would not then have any return on the value of its invested capital. Consequently any economic loss to the defaulting carrier, from a direction of service over these lines and facilities, would be minimal.

Id. at A-172 to -173.

tion—for a statute should be construed to be constitutional where possible.[30]

D. *Directed Service and the Fifth Amendment*

Essential to L&NE's argument that the ICC's denial of rent, in the usual case, to the other carrier deprives the other carrier of just compensation as required by the fifth amendment, is the assumption that directed service constitutes a taking within the meaning of that constitutional provision. We decline to accept that assumption. The line between a taking of property for which just compensation must be provided and a legitimate exercise of regulatory authority by the government, which may result in a loss but which does not require compensation, is a thin one, indeed.[31] And we recognize that on which side of this line directed service falls may be a close and difficult question. Nevertheless, we are satisfied from a review of the obligations imposed on a railroad to continue service until receiving Commission approval to abandon, even when continuation results in not unreasonable losses, and from an examination of the effects on the other carrier of directed operations that directed service, when unprofitable and as currently implemented by the ICC, does not constitute a taking for which compensation in the form of rental to the other carrier for the use of its lines must be provided.[32]

30. *See, e.g.*, Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973).

31. We note that both courts and leading commentators have encountered difficult conceptual problems in attempting to develop a comprehensive approach to defining the legitimate scope of the takings clause and, in particular, in differentiating between "takings" and "mere regulation." *See, e.g.*, Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

32. Because of our conclusion we need not and do not reach the questions whether the benefits conferred on the other carrier as a result of directed

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Appendix A

Fundamental to our holding are two conclusions: (1) that the ICC has the power to order a carrier that has not obtained a certificate of abandonment under 49 U.S.C. § 1(18) [33] to continue to provide service for as much as 240 days, the maximum period of directed service, despite a cash deficiency or operating losses [34] or, indeed, a court order to the contrary; [35] and (2) that such action by the Commission would not constitute a taking for which compensation must be provided, but rather would be merely a postponement of the carrier's right to abandon.[36] If the ICC could take the above recited action without such action constituting a taking, we think it follows directly that it could place another carrier on the lines of the carrier unable or unwilling to continue service for a limited period without effecting a taking within the meaning of the fifth amendment.

In a line of cases in the 1920's, the Supreme Court did hold that if a railroad "be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." *Brooks-Scanlon Co. v. Rail-*

32. (Cont'd.)
service as a matter of law obviate the necessity to provide rent to the other carrier and whether the ICC in promulgating its cost reimbursement regulations has usurped the judicial function of determining what constitutes just compensation.

33. Section 1(18) provides, in pertinent part:

> [N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

49 U.S.C. § 1(18) (1970).

34. *See* New Haven Inclusion Cases, 399 U.S. 392, 461, 491-92 (1970); *In re* Penn Central Transportation Co., 384 F. Supp. 895, 919 (Regional Rail Reorganization Act Special Court 1974).

35. *See In re* Erie Lackawanna Ry., 517 F.2d 893, 896-98 (6th Cir. 1975); *In re* Central R.R. of New Jersey, 485 F.2d 208, 211-12 (3d Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1131 (1974).

36. *See* New Haven Inclusion Cases, 399 U.S. 392, 490-93 (1970); Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., 294 U.S. 648, 680-81 (1935).

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road Comm'n, 251 U.S. 396, 399 (1920); *see Railroad Comm'n v. Eastern Texas R.R.*, 264 U.S. 79, 85 (1924); *Bullock v. Florida ex rel. Railroad Comm'n*, 254 U.S. 513, 520-21 (1921). While these decisions have never been repudiated by the Supreme Court, and this court does not dispute their fundamental principles, the rights of the owners of railroads have never been considered absolute; they are qualified by consideration of the public's interest in continued essential rail service.[37] Thus, a railroad may not abandon service without prior Commission approval, *New Haven Inclusion Cases*, 399 U.S. 392, 461 (1970); *In re Central R.R. of New Jersey*, 485 F.2d 208, 214 (3d Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1131 (1974), because prior "administrative review assures than an agency with substantial expertise . . . will provide that the appropriate amalgam of public concerns for rail transport and private rights of property is achieved." *Id.* at 215. Second, a railroad or its estate may be made to suffer interim reasonable losses, without compensation, for a reasonable period of time during which solutions accommodating the public and private interests can be devised—that is the exercise of the rights and remedies of the owners of the carrier or its estate may be postponed for a reason-

37. That the owners of railroads must make sacrifices in the public interest was recognized by the Supreme Court at the same time as it was deciding the *Brooks-Scanlon* line of cases. *See* The New England Divisions Case, 261 U.S. 184, 190-92 (1923); Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 479-83 (1924). A more recent and forceful statement by the Court that the railroad owners must consider the public interest as well as their balance sheets is found in the *Penn-Central Merger and Norfolk & Western Inclusion Cases*, 389 U.S. 486, 510-11 (1968):

> While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interest may or may not be served by the destructive move.

While the *Penn-Central Merger Cases* and other cases discussed *infra* generally concern railroads in reorganization, which L&NE is not, we do not consider this fact to require a different approach here. Both the bankruptcy power and the commerce power are equally subject to the fifth amendment. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 & n.19 (1935). Indeed, a railroad not in reorganization may have more of an obligation to the public. *Cf.* Myers v. Jay Street Connecting R.R., 259 F.2d 532, 536 (2d Cir. 1958).

able length of time without effecting a taking.[38] *New Haven Inclusion Cases, supra* at 493; *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 919 (Regional Rail Reorganization Special Court 1974); *see RFC v. Denver & Rio Grande Western R.R.*, 328 U.S. 495, 535-36 (1946); *Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 677 (1935).

The Supreme Court's decision in the *New Haven Inclusion Cases* is instructive in this respect.[39] While awaiting implementation of a plan of reorganization and inclusion in the Penn Central system, the New York, New Haven & Hartford Railroad had been required to continue to provide rail service and as a result to incur "substantial losses."[40] In holding that the forced deficit operation did not constitute a taking for which compensation was required, the Court stated, 399 U.S. at 491-92:

> The rights of the bondholders are not absolute. As we have had occasion to say before, security holders
>
> > "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the

38. We emphasize that we are only speaking to the situation where the carrier is forced to incur losses for a reasonable limited period of time such as is involved with directed service, the maximum period of which is limited to 240 days. We do not address the question whether a carrier or its estate may be forced to bear large losses, without compensation, for an unlimited period of time where solutions are not likely to be forthcoming. *See In re* Penn-Central Transportation Co., 384 F. Supp. 895, 919 (Regional Rail Reorganization Special Court (1974)).

39. *See generally* Note, *Conrail and Liquidation Value: Creditors' and Stockholders' Entitlement in the Regional Rail Reorganization*, 85 YALE L.J. 371 (1976); Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973).

40. The reorganization court had stated "'the losses reasonably incident to working out the solution most consistent with the public interest' [have] eroded the debtor's estate in excess of $60 million." *In re* New York, New Haven & Hartford R.R., 304 F. Supp. 793, 800 (D. Conn. 1969), *modified*, 399 U.S. 392 (1970).

> public would be considered as well as theirs." *Reconstruction Finance Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495, 535-536.

In our view, the *New Haven Inclusion Cases* dictate a holding that directed service does not constitute a taking, at least in the factual circumstances presented here. Unlike *New Haven*, where the railroad was required to continue to operate for a period of six years, directed service can last only 240 days. More importantly, whereas in *New Haven* the carrier was forced to incur "substantial" operating losses, the other carrier during a directed operation sustains no operating losses because the directed carrier transports the other carrier's traffic for it. Such was the case with L&NE which, as a result of the directed service, was spared losses it might otherwise have been legally required to incur. Finally, the other carrier's properties are maintained and in some cases upgraded during the directed operation.[41] These factors convince us that rather than suffering a diminution of their collateral, the most that the owners of a carrier suffer as a result of directed service is a postponement of their remedy of abandonment, for which no compensation is necessary. *See Continental Illinois Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., supra* at 677.

L&NE counters that all of the above cases are distinguished because they dealt with "erosion takings"—where the railroad's estate is eroded by deficit operations—and not with "conveyance takings"—where the physical properties of the carrier are taken. Directed service, it contends, involves a conveyance taking. The Supreme Court did recognize the distinction between an erosion taking and a conveyance taking in the *Regional Rail Re-*

41. The Commission in its cost reimbursement regulations provides for maintenance of way expenses and expenses necessary to bring the other carrier's lines into compliance with the Federal Rail Safety Act of 1970. ICC Report, note 7 *supra*, Joint App. at A-175, -188; 49 C.F.R. § 1126. For the specific expenditures made on L&NE's behalf see note 18 *supra* and accompanying text.

organization Act Case, 419 U.S. 102 (1974).[42] Also, in deciding the question whether a fifth amendment taking has occurred, many courts seem to have considered as determinative the physical occupation by the government of property belonging to the claimant.[43]

While we do not discount the importance of this factor, we eschew such a formalistic approach to the takings question. Although as a conceptual matter, ordering a carrier to continue operations for 240 days may differ from placing another carrier on those lines for 240 days, we do not think this possible difference dictates a holding here that the latter constitutes a taking but the former does not. It might be anomalous indeed if the ICC could order forced deficit operations by a railroad and not effect a taking, but could not order another carrier to discharge those same duties, thereby in the usual case saving that railroad operating costs, without such action constituting a taking. The ICC does not take title to the other carrier's property during directed service. The other carrier's rights to sell or dispose of its property for non-railroad use are no more qualified during directed service than they are normally since prior ICC approval is required in either case.[44]

E. *Reimbursement for Rent During a Profitable Operation*

L&NE's final contentions regarding the Commission's cost reimbursement regulations are that the distinction between profitable and unprofitable directed operations for the purpose of determining whether rent should be paid the other carrier is arbitrary and capricious and that the

42. *See also In re* Penn Central Transportation Co., 384 F. Supp. 895 (Regional Rail Reorganization Act Special Court 1974).

43. *See generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1184-90 (1967).

44. It should be noted here that L&NE did not even seek ICC approval to abandon until nearly 9 months after it had issued its embargo.

method of calculating the rent in the event of a profitable operation is also arbitrary and capricious. Neither contention convinces us to set aside the ICC's regulations.

We decline to resolve L&NE's challenge to the method of determining rent in the event of profitable directed operations at this time because directed service under Service Orders 1207 and 1208 was not profitable, L&NE did not raise this contention before the ICC and the ICC is currently considering this issue as a result of a petition by the Rock Island Railroad. As to L&NE's argument concerning the distinction between profitable and unprofitable operations,[45] the ICC made this distinction because it was concerned that the benefits normally received by the other carrier as a result of directed service might not be sufficient where the operation was profitable.[46] We do not consider that decision to be arbitrary or capricious or without rational basis.

IV.

Accordingly, the petition of L&NE to review and set aside the Commission's cost reimbursement regulations insofar as they do not provide, except for profitable operations, for the payment of rent to the other carrier will be denied.

45. The Commission asserted that L&NE had no standing to challenge the differential treatment accorded profitable and unprofitable operations because operations under Service Orders 1207 and 1208 did not result in a profit. Brief for Respondent at 46. However, L&NE is clearly aggrieved by the application of this distinctive treatment and thus in our view has standing to challenge this distinction. *See generally* Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

46. ICC Report, *supra* note 7, at A-174.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

40 Fed. Reg. 16066

Title 49—Transportation

CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B—PRACTICE AND PROCEDURE

[Ex Parte No. 293 (Sub-No. 3)]

PART 1126—SUBMISSION OF COST DATA TO JUSTIFY REIMBURSEMENT FOR DIRECTED SERVICE

Implementation of Pub. L. 93-236, section 601(e), Regional Rail Reorganization Act of 1973: submission of cost data to justify reimbursement.

On July 17, 1974, the Commission served a notice of proposed rulemaking (39 FR 26172) under the subject docket in order to promulgate a form and procedures as required of the Commission in section 601(e) of the Regional Rail Reorganization Act of 1973 (RRRA), which section constitutes an amendment of the Interstate Commerce Act by the addition of subparagraph (b) to the present section 1(16). This new provision, hereafter referred to as section 1(16)(b), authorized the Commission to respond to those cessations of service by a carrier by railroad which it finds to constitute an emergency situation by directing another railroad (the directed carrier) to temporarily provide for the handling, routing, and movement of traffic over the lines of the carrier no longer able to perform that service (the other carrier).

The Commission may invoke this emergency authority only when a cessation of service occurs under one or more of three specified circumstances (the cash position of the

carrier makes continued operations impossible, a court has ordered that service be discontinued, or service has been abandoned without a certificate from the Commission) and only after making certain findings as to the effect of such a direction on public commerce and on the directed carrier.

Section 1(16)(b) also provides for the reimbursement of the directed carrier or carriers by the Federal Government in the amount by which the cost, as referred to in subparagraph (e), of handling, routing and moving the traffic of the other carrier over that carrier's lines exceeds the direct revenues therefrom. To provide an expedited and uniform method for obtaining reimbursement, Congress required the Commission to promulgate a form on which the directed carrier would concurrently record the cost and revenues of the directed operation and which would then be submitted by the directed carrier to the Commission for audit. The Commission is then authorized to certify to the Secretary of the Treasury the amount of the payment to be made to the directed carrier which payment shall be made from funds authorized to be appropriated under section 1(16)(b).

The form proposed in the notice of proposed rulemaking served July 17, 1974, as modified, and accompanying procedures have been promulgated and are adopted in furtherance of this Congressional directive. All comments submitted with respect to the proposal were given due consideration.

As a result of comments received various changes were made, several of which follow:

1. Subsidies provided by state, regional, or local authorities to the directed carriers are to be treated and

recorded as revenues, but such revenues are to be excluded from the base upon which profit is determined.

2. Expenditures for deferred maintenance and/or rehabilitation of track, facilities and equipment of the other carrier, only insofar as essential to safety or to maintain such property at its level of repair at commencement of the directed service can be made without prior Commission approval. All other maintenance and capital expenditures require the prior approval of the Commission.

3. Monies initially borrowed for the conduct of directed operations are limited to the amount of loss suffered by the other carrier in the 60 day period in the year prior to directed service comparable to the period of directed operation. Commission approval is required for any other borrowings if reimbursement is to be sought for the interest on such additional borrowings.

These rules are issued under the authority of Part I of the Interstate Commerce Act (49 U.S.C. 1, et seq.) and the Administrative Procedure Act (5 U.S.C. 553 and 559).

Effective date. This part becomes effective on March 21, 1975.

Issued in Washington, D.C., on the 14th day of March, 1975.

[SEAL] ROBERT L. OSWALD,
Secretary.

Accordingly, Title 49 of the Code of Federal Regulations is amended by adding a new Part 1126, reading as follows:

PART 1126—SUBMISSION OF COST DATA TO JUSTIFY REIMBURSEMENT FOR DIRECTED SERVICE

SEC.

1126.1 Scope of rules in this part.

1126.2 Cost form and certification.

AUTHORITY: Sec. 601(e), Pub. L. 93-236, 87 Stat. 1021 (49 U.S.C. 1(16)).

§ 1126.1 SCOPE OF RULES IN THIS PART.

The rules in this part govern the procedures for the submission of costs and revenues to be followed by carriers subject to Part I of the Interstate Commerce Act which are directed to perform service over the lines of other carriers in accordance with orders of the Commission under and pursuant to the provisions of section 1(16)(b) of said act. The report and order of the Commission in Ex Parte No. 293 (Sub-No. 3), *Implementation of Public Law 93-236, Regional Rail Reorganization Act of 1973—Submission of Cost Data to Justify Reimbursement,* served on March 21, 1975, appearing at —— I.C.C. ——, should be used by directed carriers for guidance in the preparation of the cost form. This report and its appendix set forth the Commission's policy as to just what costs and revenues, incurred in or attributable to the conduct or directed operations, are allowable for purposes of inclusion in the cost form. Only such allowable costs and revenues will be considered by the Commission in its computation of payments due to the directed carrier under the provisions of section 1(16)(b) of the Interstate Commerce Act.

Appendix B

§ 1126.2 COST FORM AND CERTIFICATION.

The expenses and revenues incurred in the conduct of directed service shall be recorded in accordance with the cost form and its instructions as they appear below:

Instructions to Cost Form

1. Enter in column (2) the expenses directly assignable to the directed traffic moved. This includes wages, rentals and other expenses paid or incurred by the applicant and chargeable only to the directed traffic.

2. Enter in column (3) the portion of common expenses allocable to the directed traffic. Common expenses means those expenses paid or incurred for the movement of the directed traffic which are common or jointly incurred for the movement of other traffic. All expenses should be assigned direct wherever possible. Expenses not directly assignable should be apportioned on the basis of the factor suggested in column (5) or if necessary, on the basis of a more readily available and equitable factor, if such use is justified to the Commission. The relationship of the carriers' own revenues and the directed traffic revenues is an acceptable apportionment factor in cases where there are no other available apportionment factors.

3. Enter in column (4) the total of columns (2) and (3).

4. The cost of rehabilitation of the line necessary to permit operation should be shown in the maintenance of way accounts. Expenditures for substantial improvements shall require authorization by the Commission.

5. Expenses included in lines 13, 23, 38, 42, 47, and 53 should be identified on a separate sheet.

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COST FORM

Line No.	Account No.	Directed traffic			Suggested apportionment factors
		Direct	Common apportioned	Total	
	(1)	(2)	(3)	(4)	(5)
	Operating expenses maintenance of way and structures				
1	202, 212, 214, 216, 218, and 220				Equated track miles.
2	227 and 249				Carloads handled.
3	231, 233, and 247				Revenue tons.
4	235				Total repairs—expenses.
5	229, 237, 239, 241, 243, and 265				Miles of road.
6	244				Trailers handled loaded and empty.
7	206, 208, 210, and 221				Equated track miles.
8	274				Direct.
9	201, 275-277, and 282				Accounts 202-265.
10	266, 267, 269-273, and 281				Miles of road.
11	253 and 257				Accounts 311 and 314—expenses.[1]
12	278 and 279				Miles of track.
13	All other expenses		xxx		Direct.
14	Total of maintenance of way and structures.	xxx	xxx		
	Maintenance of equipment.				
15	311 (yard)				Locomotive unit-miles.
16	311 (other)				Gross ton-miles.
17	314				Freight train car-miles cars-loaded and empty.

[1] Railroads having electrified systems should use electric locomotive unit-miles.

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Line No.	Account No.	Directed traffic: Direct	Directed traffic: Common apportioned	Directed traffic: Total	Suggested apportionment factors
	(1)	(2)	(3)	(4)	(5)
18	317				Passenger train car-miles.
19	318				Vehicle miles loaded and empty.
20	323				Number of carloads handled.
21	301, 326, 328, 332-335 and 339				Total repairs—expenses.
22	302, 304, 305, 306, 329, 331, 336 and 337.				Do.
23	All other expenses		xxx		Direct.
24	Total of maintenance of equipment.	xxx	xxx		
	Transportation				
25	372				Train-miles.
26	373				Revenue-tons.
27	389				Yard switching locomotive unit-miles.
28	371, 409-411, 444 and 420				Accounts 372, 373, 376 and 389—expenses.
29	404-407 and 415-419				Train-miles.
30	376				Revenue tons.
31	374, 375, 408	xxx			Direct.
32	377-380, 382-384, 388, 390 and 391.				Yard switching locomotive unit-miles.
33	392 and 404				Accounts 392 and 401 direct assignments.[2]
34	394-396, 400, 412 and 413				Locomotive unit-miles including train switching.
35	402				Freight train car-miles loaded and empty including caboose.
36	403				Passenger train car-miles.

[2] Assign train enginemen and trainmen expenses direct to carrier's own traffic and directed traffic. Apportion common expenses on the basis of direct assignments of accounts 392 and 401.

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Line No.	Account No.	Directed traffic: Direct	Directed traffic: Common apportioned	Directed traffic: Total	Suggested apportionment factors
	(1)	(2)	(3)	(4)	(5)
37	421 and 422				Trailers handled—loaded and empty.
38	All other expenses				Direct.
39	Total transportation	xxx	xxx		
	Miscellaneous operations				
40	449		xxx		Direct.
41	441-448				Apportion according to local condition.
42	All other expenses		xxx		Direct.
43	Total miscellaneous	xxx	xxx		
	General and traffic expenses				
44	450		xxx		Direct.
45	451-455, 457-462			Expenses lines 14 24, 39 and 43.	Apportion on the basis of total.
46	351-360				Accounts 451-462 expenses.
47	All other expenses				Direct.
48	Total general and traffic				
49	Total expenses lines 14, 24, 39 43 and 48.	xxx	xxx		
	532 Railway tax accruals				
50	Payroll taxes		xxx		Direct.
51	Property taxes				Miles of road.
52	State income taxes		xxx		Direct.
53	Other taxes excluding income taxes.				Miles of road.
54	Total taxes, lines 50-53	xxx	xxx		

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Line No.	Account No.	Directed traffic: Direct	Directed traffic: Common apportioned	Directed traffic: Total	Suggested apportionment factors
	(1)	(2)	(3)	(4)	(5)
	Rent income				
55	503				Car-miles.
56	504 and 506				Assign where applicable.
57	505				Do.
58	507				Nonrevenue ton-miles.
59	508				Assign where applicable.
60	Total rent income lines, 55-59.	xxx	xxx		
	Rent payable				
61	536				Car-miles.
62	537				Locomotive unit-miles.
63	538				Assign where applicable.
64	539				Assign where applicable.
65	540				Nonrevenue ton-miles.
66	541				Assign where applicable.
67	542				Do.
68	543				Do.
69	Total rents payable lines 61-68.	xxx	xxx		
70	551	xxx	xxx		Direct.
71	Total expenses, rents and taxes, lines 49 and 54 less 60 plus 69 and 70.	xxx	xxx		
	Revenues				
72	101	xxx	xxx		Actual.
73	102	xxx	xxx		Actual.
74	All other	xxx	xxx		Actual.
75	Total revenues	xxx	xxx		

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Line No.	Account No.	Directed traffic: Direct	Directed traffic: Common apportioned	Directed traffic: Total	Suggested apportionment factors
	(1)	(2)	(3)	(4)	(5)
76	Local/State subsidies	xxx	xxx		Actual.
77	Total income line 75 and line 76.	xxx	xxx		
78	Total expenses over income (line 71 and 77).	xxx	xxx		
	Computation of reimbursement				
79	Allowance for profit, line 75 X .06[3].	xxx	xxx		
80	Working capital[4]	xxx	xxx		
81	Total deficiency plus working capital (line 78 plus line 80).	xxx	xxx		
82	Amount borrowed[5]	xxx	xxx		
83	Interest allowed[6]	xxx	xxx		
84	Total expenses plus profit plus interest (lines 71, 79 and 83).	xxx	xxx		
85	Reimbursement including an allowance for profit (line 84 minus line 77).[7]	xxx	xxx		

[3] Profit is based on 6 percent of total revenue (line 75). A profit from actual operations above 6 percent of total revenues may be retained by the directed carrier and no amount for profit will be paid by the Federal Government. Should a profit of less than 6 percent be earned, the difference between 6 percent and that percent will be paid.

[4] Total expenses in line 71 divided by the total days of the directed operation. Multiply these expenses by a factor of 15 (days) to represent the lag between cash and receipts and cash payments.

[5] The amount borrowed should not exceed the permissible limits established in the ex parte 293 (sub-No. 3) report, unless specifically approved by the commission.

[6] Apply the average prime rate (per annum) in effect at New York City to line 81, or the prime rate (per annum) in effect at New York City on the date of the loan agreement to line 82, whichever is greater. However, the interest allowed on amounts actually borrowed shall not exceed the amount of interest charged on the loan, if less than the applicable prime rate.

[7] If line 77 is larger than line 84, enter 0.

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Attention

Knowing and willful misstatements or omissions of material facts constitute federal criminal violations punishable by up to five years imprisonment and fines of up to $10,000 for each offense. (See 18 U.S.C. 1001, 1003, 287.)

Each person by whom this document is signed certifies that the representations appearing herein and in the appendices attached hereto (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete, based upon all the information required to be included therein, of which he has any knowledge.

Dated this ———— day of ————, 19——.

———————————

(Signature of Accounting Officer)

By ———————————

———————————

(Title)

[FR Doc. 75-9151 Filed 4-8-75; 8:45 am]

APPENDIX C

Report of the Interstate Commerce Commission

INTERSTATE COMMERCE COMMISSION
Ex Parte No. 293 (Sub-No. 3)

IMPLEMENTATION OF PUBLIC LAW 93-236, SECTION 601(e), REGIONAL RAIL ORGANIZATION ACT OF 1973—SUBMISSION OF COST DATA TO JUSTIFY REIMBURSEMENT

Service Date March 21, 1975

Dated March 14, 1975.

Upon investigation and consideration of views, arguments, and representations of the parties following the issuance of a Notice of Proposed Rulemaking and Order (not printed), the adoption of a general form and accompanying procedures for submission of costs, revenues, and other pertinent information to justify reimbursement by the Secretary of the Treasury found to be in the public interest. Appropriate order entered.

Paul R. Duke, C. E. Futcher, A. W. Hesse, Jr., William P. Higgins, Charles E. Mechem, F. C. Nash, Bernard O. Phillips, D. Scott Railsback, and *Thomas E. Tisza,* for the railroad respondents.

Robert L. Calhoun and David M. Schwartz for the Lehigh Coal and Navigation Company.

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William L. Bush, C. P. Ellenwood, Jr., and *John H. King* for shippers.

James I. Collier, Jr. and *William M. Maloney* for the Association of American Railroads.

John M. Cleary and *John F. Donelan* for the National Industrial Traffic League.

Edward J. Hickey, Jr., William J. Hickey, and *Geoffrey N. Zeh* for the Railway Labor Executives' Association.

Constance L. Abrams, Rodney E. Eyster, and *James C. Schultz* for the Department of Transportation.

REPORT OF THE COMMISSION

By the Commission:

On July 11, 1974, a Notice of Proposed Rulemaking and Order (Implementation of Public Law 93-236, Section 601 (e), Regional Rail Reorganization Act of 1973—Submission of Cost Data to Justify Reimbursement, dated June 28, 1974 (not printed)), was served initiating this rulemaking proceeding to promulgate a form and procedures as required of the Commission in section 601(e) of the Regional Rail Reorganization Act of 1973 (RRRA). In brief, that section constitutes an amendment of the Interstate Commerce Act by adding a subparagraph (b) to the present section 1(16). This new provision, hereafter referred to as section 1(16)(b), authorizes the Commission to respond to those cessations of service by a carrier by railroad which it finds to constitute an emergency

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situation by directing another railroad (the directed carrier) to temporarily provide for the handling, routing, and movement of traffic over the lines of the carrier no longer able to perform that service (the other carrier). The Commission may invoke this emergency authority only when a cessation of service occurs under one or more of three specified circumstances (the cash position of the carrier makes continued operations impossible, a court has ordered that service be discontinued, or service has been abandoned without a certificate from the Commission) and only after making certain findings as to the effect of such a direction on public commerce and on the directed carrier.

Section 1(16)(b) also provides for the reimbursement of the directed carrier or carriers by the Federal Government in the amount by which the cost, as referred to in subparagraph (e), of handling, routing and moving the traffic of the other carrier over that carrier's lines exceeds the direct revenues therefrom. To provide an expedited and uniform method for obtaining reimbursement, Congress required the Commission to promulgate a form on which the directed carrier would concurrently record the cost and revenues of the directed operation and which would then be submitted by the directed carrier to the Commission for audit. The Commission is then authorized to certify to the Secretary of the Treasury the amount of the payment to be made to the directed carrier, which payment shall be made from funds authorized to be appropriated under section 1(16)(b).

The form proposed in the Notice of Proposed Rulemaking dated June 28, 1974, as modified herein, and the accompanying procedures have been promulgated and are adopted in furtherance of this Congressional directive.

Appendix C

STATEMENTS OF PARTICIPANTS

Statements recommending revision of the proposed cost form were filed by 7 carriers by railroad, 3 shippers, the Lehigh Coal and Navigation Company, the Association of American Railroads, the National Industrial Traffic League, the Railway Labor Executives' Association, and Department of Transportation. None of the respondents questioned the propriety of issuing the proposed cost form. In general, the comments were addressed to specific errors and deletions in the cost form as it was proposed, to the need for further and more detailed explanatory materials or regulations governing application of the cost form, and to the nature of and procedures to be followed under an actual Commission order directing emergency operations.

The statement of the Central Railroad of New Jersey, R. D. Timpany, Trustee, objects to the lack of a provision recognizing rent paid by the directed carrier to the carrier no longer able to perform the service as a cost item. CNJ recommends that guidelines as to the value of the property be included in the final cost form regulations. These guidelines would, in turn, form a framework for negotiations between the directed carrier and the other carrier in establishing acceptable rental. To protect the interests of the U.S. Treasury, CNJ further suggests that the rental negotiations be conducted between the carriers involved and the ICC. CNJ also raises questions as to the definition of "deferred maintenance" as that term is used in the proposed cost form, the extent of the obligations incurred by the directed carrier with reference to employees of the other carrier hired to perform the directed service, and the ultimate effect of recog-

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nition by the Commission of certain capital expenditures as a cost of the directed operation.

The Delaware and Hudson Railway Company requests, in its statement, that the final cost form include more specific guidelines as to the extent and duration of employment obligations and practices which will be assumed by the directed carrier in relation to the employees of the other carrier, the nature of these common expenses which the Commission will recognize as a cost of the directed operation, the division of revenues when subdivision of established divisions is required or when no appropriate division has been published, and the extent to which expenses related to certain contingent liabilities will be recognized as a compensable cost. D&H also seeks clarification with regard to its assumption that the principal amount borrowed for necessary operating funds as well as the interest thereon will be treated as a recognizable cost.

The submission by the trustees of the Penn Central Transportation Company seeks inclusion in the final cost form of regulations on (1) acceptable division of revenues, (2) recognition of expense and revenue items resulting from new operations on the lines of the directed carrier necessary to performance of the directed operation, and (3) the methods of record-keeping necessary to meet the requirement that detailed separations in accounting records be kept. Penn Central also questions the propriety of the proposed apportionment factors for certain expense accounts, suggests preferable factors, and concludes that a flat 6 percent of revenue allowance for profit may, where revenue from the directed operation is low, be less than adequate to reflect a return on investment.

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The Detroit, Toledo & Ironton Railroad Company's statement deals specifically with the problems which could arise under a Commission directive to the DT&I or another railroad to operate the currently suspended Ann Arbor Railroad Company car ferry service. From this specific example, DT&I concludes that greater attention should be paid, in either the cost form or the actual Commission directing order, to the ownership or acquisition of equipment to be used in performing the directed service, including the need to establish appropriate rents for use of equipment, and for the Commission to approve capital and deferred maintenance expenditures for purchase of equipment necessary to conduct the directed operation. DT&I also requests that the final cost form contain regulations on allocation of revenues and suggests certain factors which should be considered. DT&I also favors negotiations, prior to issuance of a directive between the Commission and the carrier involved.

Reading Company suggests that a provision be adopted for adjustment of interline accounts between carriers to reflect accounts arising after the date of submission of the cost form by the directed carrier and to determine the proper party to handle collections, settlements, disbursements, etc. after submission of the cost form. Reading, in common with other railroad respondents, recommends that an expedited procedure be established in the final cost form for obtaining Commission approval of necessary capital and deferred maintenance expenditures, that a clear definition of rent income be established, and that a formula to determine a fair rent for use of non-operating carrier's railroad and facilities be established prior to any order for directed service.

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The Union Pacific Railroad Company contends that section 1(16)(b) does not give the Commission authority to exclude certain expenses from the reimbursable costs and that the procedure for cost reimbursement established in that section requires the reimbursement of all costs incurred in the performance of a directed service, with the cost figures subject only to technical Commission audit. On this basis, UP objects to the requirement that all expenditures for deferred maintenance and capital expenditures be subject to prior Commission approval and maintains that protection against unjustifiable use of Treasury funds can be provided through review and audit subsequent to reimbursement with provision for refund of improperly claimed amounts. UP further suggests that policies, procedures, and standards be clarified in terms of deferred maintenance vs. necessary rehabilitation, expenditures meeting the "essential to safety" criteria, approvable capital expenditures, and timing and appeal from a final request for reimbursement. UP also seeks specific clarification of the following: whether lease payments on equipment leases under which the directed carrier is the lessor constitute a compensable cost, whether the directed carrier may terminate employees of the other carrier who it believes are unnecessary to performance of the directed service, and whether compensable common expenses of a directed operation include those incurred in use of a directed carrier's facilities, employees, and equipment. UP objects to both the allowable profit and the interest factor as being too low and recommends that the Commission establish in its final cost form a minimum profit factor of 6 percent with allowance for a reimbursable profit above that amount at the profit level of the directed carrier and an interest factor at the prime rate or the di-

rected carrier's return on invested assets, whichever is higher. UP also requests that the actual procedures for obtaining final reimbursement be more clearly set forth, including specific time limits within which reimbursement must be made and a specific appeal procedure.

In its statement, the Lehigh Valley Railroad Company points out that, especially if the directed carrier is itself undergoing reorganization, obtaining the cash or credit necessary to perform a directed operation may present some difficulty and should be the subject of advance planning. Lehigh Valley further notes the difficulty it might face in maintaining required detailed separations in accounts with its present personnel. While the proposed cost form provides for the establishment of a reasonable reserve for liabilities determined after submission by the directed carrier of the final cost form, Lehigh Valley suggests that this provision also provide for recovery of final settlements which are in excess of the initial estimated reserve. Lehigh Valley questions the propriety of certain apportionment factors and accounts and recommends alternatives. It also suggests that the final cost form provide for payment by the directed carrier to the other carrier of rental for the use of its lines and other facilities and contain guidelines under which the carriers could establish an appropriate rental rate.

The Lehigh Coal and Navigation Company, owner of certain rights which are currently leased to and operated by Lehigh Valley, is specifically concerned with the effect of a cessation of these particular Lehigh Valley operations on its receipts of rental payments under its existing lease with Lehigh Valley. LC&N requests that the final cost form clearly indicate that such lease payments

are a compensable cost of a directed operation whether or not operations over that particular leased line are profitable and, in general, clarify the right of the other carrier or the owner of a line leased to the other carrier to receive adequate compensation for use of its property.

The representatives of shipper interests which filed statements in this proceeding included the Georgia-Pacific Corporation, Weyerhauser Corporation, the American Plywood Association, and the National Industrial Traffic League. These parties did not, in general, comment directly on the content or scope of the proposed cost form, but, rather, concentrated on the effect of an actual Commission service directive on shippers and on orderly continuation of rail service. Their recommendations include: (1) a Commission order should require that the equipment and facilities as well as trackage of the other carrier be made available to and used as necessary by a directed carrier, (2) arrangements should be made with a directed carrier prior to issuance of a Commission order so that implementation and operations planning may be completed and directed service may commence within 24 hours after cessation of service by the other carrier; (3) affected shippers should be fully informed in advance of all details of a directed operation; (4) advance operational planning should take precedence over procedural and accounting details; and (5) expenditures with respect to employees of the other carrier should be treated as a compensable cost only when those employees are actually hired to perform the directed service, as other employee payments constitute a social cost to be borne by the Federal Government, not by the shipping public.

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The Association of American Railroads initially directs its statement toward basic problems involved in any direction of service by the Commission arising under section 1(16)(b). The AAR anticipates that a directed carrier may have to provide the employees, supervisors, equipment and maintenance necessary to performance of a directed operation, may be required to initially absorb all the costs arising out of such an operation, and may have to undertake the full operational and financial burden of a directed service without advance notice. The AAR concludes that the financial ability of a potential directed carrier to assume the immediate costs of a directed operation out of its own funds or to raise sufficient capital to cover those costs should be a controlling factor in the scope of a directing order and that the danger in directing a marginally solvent railroad to undertake a directed operation should be fully considered. As to the introductory statements and instructions accompanying the proposed cost form, the AAR points out the potential difficulty for some railroads of maintaining detailed separations in accounting records and suggests a construction of the term "common expenses" which would include those incurred on movements over the lines of a directed carrier or the lines of multiple directed carriers continuing on the lines of the other carrier. The AAR further assumes that normal maintenance expenditures to maintain existing service standards as well as expenditures to meet minimum safety requirements are compensable costs. The AAR recommends that a particular person or office be designated to expedite Commission approval of expenditures for deferred maintenance and capital expenditures and that any such expenditures be directly and immediately reimbursed at cost plus 10 percent. Reimbursable expenditures with respect to personnel of the other carrier should, according to the AAR, be limited to those incurred during the directed operation and should not include amounts previously earned but claimed during the period of the directive. The AAR requests that the Commission's language covering existing subsidies be revised so that a directed carrier will not be penalized for subsidy withdrawal and to allow a carrier, upon withdrawal of a subsidy, to cease the formerly subsidized operation or to be compensated in full for its cost. As to the amount of interest recognized in the cost form, the AAR suggests that the weak financial condition of the railroad industry precludes borrowing of the working capital necessary for a directed operation at the prime rate, that the rate of interest allowed as a compensable cost should be the average prime rate plus one percent, and that the average prime rate would most appropriately be calculated on an annual basis compounded monthly for each month of the directed operation. The AAR questions the adequacy of a reserve for contingent liabilities as protection for a directed carrier, contends that only a zero deductible insurance policy covering all contingencies during a directed operation, though extremely expensive, could provide adequate protection, and further concludes that such insurance should also cover potential liability to those employees of the other carrier hired by the directed carrier. The AAR statement also comments extensively on the inclusion and exclusion of numerous specific cost and revenue accounts, the identification and apportionment of common expenses, and the impropriety of certain apportionment factors suggested in the proposed cost form. In conclusion, the AAR recommends that both the final cost form and any accompanying regu-

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lations adopted by the Commission remain open to future necessary changes and to allow for reimbursement for contingent liabilities not covered by insurance.

The Railway Labor Executives' Association requests that any Commission order directing emergency rail service include the conditions for protection of employees prescribed in the *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, as the protective provisions of Title V of the RRRA are inapplicable and as section 601(e) itself provides inadequate protection for affected employees. RLEA also indicates a potential problem in determining which employees of the other carrier should be hired by the directed carrier to perform the directed service. It contends that the final cost form should specifically recognize as a compensable cost the expenditures resulting from the imposition of protective conditions.

The Department of Transportation alleges that the method for computation of reimbursable expenses included in the proposed cost form would promote operational inefficiency by the directed carrier and, in fact, provides an incentive for the directed carrier to expand expenses, especially common expenses, as much as possible. The DOT suggests that the final cost form require the directed carrier to keep separate accounts for common expenses as well as for all other accounts in which apportionment is not essential. Where apportionment factors for certain expenses are suggested, the Commission should set forth the rationale for each particular selection. The DOT recommends that apportionment of common expenses only be allowed where the overhead of the directed carrier is affected so that only actual expenditures for directed services will be reimbursed and that for any necessary apportionment factors suggested in the final cost form, the correlation between factor and expense should be demonstrated. The DOT further believes that the recognized profit factor should contain an incentive element and suggests such a factor which would permit the directed carrier to claim a larger percent of gross revenues as profit when the directed operation moves toward profitability.

THE SCOPE AND PURPOSE OF SECTION 1(16)(b)

Section 1(16)(b) was enacted by Congress in response to, among other factors, threatened cessations of service by those bankrupt carriers operating in the Northeast and Midwest which are the concern of the Regional Rail Reorganization Act of 1973. While its applicability to railroads operating beyond the region and after the period of the Regional Rail Reorganization Act is indicated by making this emergency service provision an amendment to the Interstate Commerce Act, section 1(16)(b) is strictly limited in scope to clear emergency situations where immediate action must be taken to prevent severe transportation and economic dislocations and is further limited in time to a stop-gap measure to be continued only until a permanent solution to the other carrier's difficulties can be found.

The available legislative history supports this Commission in its conclusion that section 1(16)(b) is not intended to provide a permanent method of dealing with cessations of service or the causes of such cessation or a definitive cure for railroad service problems. In the Report of the Senate Commerce Committee on Senate Bill No.

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1925 (the original source of the provision with which we are concerned herein), the duration of a Commission emergency service directive is strictly limited, in other than extraordinary circumstances, to only the initial 60 days and only "while a permanent solution is being formulated." (Essential Rail Services Continuation Act of 1973. Senate Report 93-302, 1973.) This Committee discussion further indicates that Congress did not intend that all the operations of the other carrier be undertaken by the directed carrier but that emphasis be placed upon preserving operations over main lines which could be operated by the directed carrier at a profit. The Commission believes that the narrow intended scope of section 1(16)(b) should guide its issuance of any ultimate orders directing service and its formation of policies and explanations with regard to the final cost form herein.

Because of the clear Congressional intent that section 1(16)(b) not be viewed or used as a cure for the numerous ills of troubled railroads, and the expressed desire that federal financing of such temporary stop-gap measures be kept to the statutory minimum, the Commission concludes that its powers under section 1(16)(b) are not limited to merely ordering directed service. That section specifically requires the Commission to promulgate a general cost form, with which we are concerned herein, to standardize and simplify the final reimbursement procedure and states that each directed carrier shall submit that form, upon completion of a directed service, to the Commission. Only after completion of an audit shall the Commission certify to the Treasury the amount which should be paid to the directed carrier to reimburse it for the amount by which the total cost of the directed operation exceeded the direct revenues derived therefrom.

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The emphasis in the legislative discussions of section 1(16)(b) on the temporary nature and profit potential of a directed operation indicates to the Commission that guidelines and policies accompanying the general cost form should emphasize limited, short-term expenditures and should make clear to the directed carrier that only expenditures absolutely necessary to performance of the service directed will be considered in determining the amount of final payment to the directed carrier. Thus the legislative discussion states specifically that the Commission, in its cost form, shall determine appropriate allocations and what constitutes a reasonable profit. The Commission in its original proposed cost form and in the final form has not attempted to dictate that certain costs be rejected but has sought to establish guidelines as to those expenditures which would be acceptable within the framework of section 1(16)(b). While the explanatory materials to the final cost form, as well as anticipated prior discussions between the carriers involved in a directed operation and Commission representatives are intended to avoid the need for Commission challenge to any claimed expenses, it would be entirely unacceptable for all claimed costs, subject only to a technical audit, to be paid without evaluation of their propriety. The Commission views its role as that of mediator between the directed carrier and the other carrier in terms of charges to which they must mutually agree and as that of overseer of the general reasonableness of expenses incurred in performance of a directed operation, and hopes that, with the cooperation of all parties, it can maintain that limited role. The standards established in the final cost form are intended to simplify and standardize the admittedly complex accounting procedures imposed upon a directed carrier and

to limit those expenditures which may be reimbursable by the Federal government to those essential to performance of a directed service within the guidelines established by section 1(16)(b) itself and within the clear intent of Congress to keep Federal expenditures to a minimum.

Section 1(16)(b) is phrased in terms of the transportation of "traffic" rather than the performance of "car service," as defined in section 1(10). While section 1(10) limits "car service" to the transportation of property, subsections (15) and (16) of section 1, as supported by language in subsection (17) of that section, appear to extend the Commission's authority beyond the narrow scope of "car service" to cover additional items included in the broader term traffic. Any cessation of passenger service would create inconvenience, if not an emergency to the users of the service. Obviously, cessation of any passenger service creates an immediate public awareness, but commuter service is generally supported by State and local funds. It must be remembered that the true emergency situation more likely lies in the cessation of essential freight service. For it is the cessation of freight service that could result in massive industry shutdowns with resulting unemployment which in toto would result in local, if not national, economic distortions.

Section 1(16)(b) envisions that a directed carrier will, to the extent that the Commission orders it to perform a particular operation, step into the shoes of the other carrier in relation to that operation. Thus, in addition to the actual physical performance of the operation with the employees of the other carrier, the directed carrier will collect and disperse all revenues and expenses arising out of the directed operation, handle all purchasing

and billing, and undertake all operating functions of the other carrier. The directed carrier will not assume the burden of any of the other carrier's existing debt, though it will be responsible for expenses of the directed operation, or of any payments due to employees of the other carrier upon commencement of the directed operation or arising during that operation from prior events. Further obligations of the directed carrier will be delineated in the Commission order directing that a particular service be performed. Such duties and responsibilities will remain with the directed carrier only for the actual duration of a directed operation.

Discussion and Conclusion

General Comments. Many of the statements filed in this proceeding are directed, in part, not toward the content and application of the proposed cost form, which is the subject herein, but toward the general purport and effect of potential Commission directives under section 1(16)(b). The principal concerns of these interested parties, particularly those representing shipper interests, are the need for advance notice and planning before any Commission action under section 1(16)(b) is taken; the desire that any emergency operation commence within 24 hours after a cessation of service; and the need for any Commission directive to deal specifically with the use and availability of equipment for performance of a directed service.

While this proceeding deals exclusively with preparation of a general cost form to provide for uniform reimbursement of all directed carriers, the realization that any

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Commission order directing emergency service would be handled under expedited procedures without formal pleading compels us, in the present proceeding, to comment briefly on the general problems and policies concerning any future Commission directives under section 1(16)(b) of the Interstate Commerce Act. Any action which the Commission takes under section 1(16)(b) will necessarily be tailored to the particular emergency situation involved, thus our statements must deal solely with general policy matters.

Initially, every effort will be made by the Commission to inform all interested persons, including shippers and employee representatives, as far in advance as possible of any imminent order directing service. The timing of such public notice will, of course, be limited by the Commission's desire to avoid causing undue public alarm over situations which do not immediately or definitely demand Commission action and by the advance warning of a cessation of service which the Commission itself receives. In the same vein, while recognizing the significant value of prior discussions between the carrier parties to a section 1(16)(b) order and other interested parties, the Commission's opportunity to initiate such discussions will be limited by the notice which it has of an impending emergency.

While emphasizing the need for adequate advance notice of a pending Commission directive, several of the statements submitted also insist that emergency directed service must commence within 24 hours of any cessation of essential service. Under certain circumstances, such as a cessation of service upon little or no notice to the Commission, a regulation requiring prior negotiations between affected parties would be in direct conflict with a

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requirement that essential services be resumed within 24 hours. The potential for just such a situation to arise emphasizes the necessity for the Commission to retain ultimate flexibility as provided by the expedited procedures in section 1(15).

Several of the parties to this proceeding express concern with the actual availability of equipment and facilities to a directed carrier for the performance of a directed service and request that any Commission directive deal specifically with this subject. The language of section 1(16)(b) itself, by including within the term "cost" expenditures for the "rental or lease of necessary equipment", clearly contemplates that operating equipment will be made available for performance of the directed service. The most readily available source for such equipment would clearly be the carrier no longer able to provide the service, and to insure that such equipment will actually be at the disposal of the directed carrier, the cost form specifically provides (Account 542) that the rental paid to the other carrier for use of such equipment will be a reimbursable cost, assuming that such costs are substantiated in accordance with existing AAR procedures. Each actual order of the Commission directing service will, of course, specify to the extent necessary the rolling equipment to be used in performance of a directed operation, and it is anticipated that the actual conditions for such use will be worked out during discussions between the affected carriers and the Commission. The inclusion of rental payments for necessary rolling equipment as a compensable cost would cover all payments whether made to the other carrier for use of its owned equipment, to a third carrier or to the directed carrier itself for traditionally leased equipment, or to the actual owner of equip-

ment necessary to performance of the directed service. It is anticipated that all equipment charges will be established on the basis of existing AAR codes.

The Commission holds a similar view with respect to the use of other railroad facilities and property of the carrier no longer able to perform a transportation service. Any order of the Commission directing emergency service, in addition to requiring operations to be performed over the lines of the other carrier, will also require that those facilities and railroad properties of that carrier which are necessary to performance of the directed service shall be made available to the directed carrier. As discussed below, the Commission shall determine the rents, if any, which shall be paid the carrier no longer able to perform the transportation service, for the use of its properties.

Should rental agreements already exist under which the other carrier leases lines or properties, other than the previously discussed rolling equipment, for its operations, the directed carrier shall pay the existing rental for those lines and other properties which are necessary to the performance of a directed operation, and such payments shall be recognized as a reimbursable cost of that operation and shall be so recorded on the cost form (Account No. 542). The directed carrier will assume the applicable obligations of the other carrier under such agreements. Such agreements shall be applicable, subject of course to Commission audit, even if the lines and property involved are leased from the directed carrier or an affiliate. As the other carrier is thus relieved from certain of its monetary and other obligations under outstanding agreements, the other carrier is not entitled to any additional payment itself for use of lines and facilities which it has previously operated under lease.

Questions have been raised whether or not the carrier whose operations are being performed by a directed carrier should be compensated for the use of its lines and facilities, and if so, what factors should be considered in computing the measure of the compensation to a carrier who has defaulted on its legal obligation to provide service to the public.

The statutory language of section 1(16)(b) does not speak to this issue. Nor does the legislative history provide any indication of the intention of Congress. The relevant portion of this section requires a payment from the funds of the United States solely to a directed carrier of the costs incurred in performing the directed service with a reasonable profit. In defining costs, the statute provides as follows:

> The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit.

It would appear from the foregoing that if rent or compensation for the use of an operated carrier's property is to qualify as a cost, the qualification must result from the inference that such rent is an expenditure to be "incurred" by a directed carrier. There is no other logical wording in the statute which lends support for the inclusion of rent as such an item of cost. However, the opposite conclusion, that Congress did not intend that the carrier ceasing operations to be compensated for the use of its properties, may also be inferred by the absence of any statuory reference to such a payment. Consequently,

this question must be resolved by an examination of the legal obligations of the carrier whose operations are being performed under directed service.

Under the Interstate Commerce Act, all common carriers by railroad must fulfill their common carrier obligation to continue service to the public (Section 1(4)), unless and until a certificate of abandonment is authorized by the Commission pursuant to the provisions of section 1(18) of the Act. Under the requirements of section 1(16)(b), in order for the Commission to issue a directed service order, the operated carrier, having ceased operations without obtaining a certificate of abandonment from the Commission, must be in dereliction of its statutory duty to continue to provide such service. *Smith* v. *Hoboken R. Co.*, 328 U.S. 123, 130 (1946). It is highly unlikely that Congress in its consideration of section 1(16)(b) desired to provide a monetary incentive for the unlawful abandonment of rail service. Rewarding a railroad for avoiding such a legal obligation would be contrary to public policy.

Additionally, since the authority to abandon the rail properties has not yet been approved, the carrier cannot legally convert the capital it has invested in the property to a non-rail use. Until such an abandonment is approved, these assets would be unutilized and thus be subject to deterioration since the carrier has no funds available either to continue operations or maintain its properties. The defaulting carrier, in most foreseeable situations, would not then have any return on the value of its invested capital. Consequently any economic loss to the defaulting carrier, from a direction of service over these lines and facilities, would be minimal.

Whatever consideration is given to the economic loss of the operated carrier because of the ordering of directed service over its properties must be balanced by a consideration of the benefits conferred by such an order. First, the carrier avoids incurring any additional operating losses which might impair the interests of its creditors or further erode its invested capital. Further, during the period of the directed service, the property will be maintained in order to continue service and all employee obligations for those employees hired by the directed carrier will be satisfied. Consequently, in ordering directed service, the Commission both fulfills the carrier's legal obligation to continue to provide service and preserve the value that the operated properties might have for continued use in their dedicated purpose.

Accordingly, it is our view that in the usual situation, where costs exceed revenues, no compensation or rent for the use of the defaulting carrier's lines and facilities is required. It must be emphasized that the Commission would not be able to order directed service if the carrier elected to continue operating or, if the carrier with appropriate authorization, could convert its properties to another use. Consequently, there is no economic loss to the defaulting carrier resulting from the Commission's ordering of directed service. Further, the Commission's ordering of such service confers certain substantial benefits, as discussed *supra*, which in most cases are sufficient to discharge any obligation to pay such compensation or rent. However, situations may arise where temporary operations may be profitable to a directed carrier, and in those situations the defaulting carrier may be entitled to some payment. In the situation of such a profit, compensation should be minimal. The property is being used tempo-

rarily in the manner and for the purpose it was dedicated to be used. This temporary use is easily distinguishable from a permanent taking as found in emiment domain. And, the overall economic loss of the carrier, as discussed above, should be slight since the provisions of section 1(18) prohibit the use of the property for any other purpose until such time as authority to abandon is granted.

Under the circumstances of a profitable operation, compensation to be paid to a carrier for the temporary use of its rail associated property should be measured by the lessening of its economic value on the same basis that the carrier itself, if operating, would compute the decrease in value in accordance with its accounting records. This loss would not exceed the amount of normalized depreciation on the recorded net book value of the defaulting carrier's property used in the directed operation. In the event that a betterment system of accounting if used for certain property accounts, depreciation will be allowable in a manner to be determined by the Commission. The amount of rent, if any, to be paid to the other carrier shall be determined by the Commission during its audit of the accounts of the directed carrier.

The amount of the rent, if any, shall be reduced by the amounts expended during the period of directed operation, with Commission approval, which provide a direct benefit to the other carrier or its estate. These deductions include, but are not limited to, the following expenditures: capital improvements, catch-up of deferred maintenance, betterments to permit operations or compliance with safety standards, and satisfaction of certain liabilities of the other carrier, such as the payment of accrued vacation pay.

Subparagraph D of section 1(16)(b) requires that a directed carrier hire those employees of the other carrier to the extent that such employees had previously performed the directed service for the other carrier, and the introductory statement to the Commission's proposed cost form recognizes as a compensable cost of a directed operation expenditures for wages, salaries, and payments of benefits to certain persons having an employment relationship with the directed carrier for purposes of performance of a directed service. While section 1(16)(b) does not require a directed carrier to hire all former employees of the other carrier, and the proposed cost form recognizes as compensable only those expenditures made to or for the benefits of employees necessary to performance of a directed service, the language, at least as to such employees and related carrier obligations and practices, is mandatory, and no provision is made, as suggested by the Union Pacific, for termination of certain employees by the directed carrier. It is assumed by the Commission, and will be so ordered in each particular situation, that only necessary employees, as that term is used in the proposed cost form, will be hired and, in turn, compensated and that any additional affected employees will have been terminated by action of the other carrier as a result of its cessation of service and not by action of either the directed carrier or the Commission. Similarly, employment obligations and practices and expenditures resulting therefrom will only be imposed upon the directed carrier as to employees actually hired and only during the actual period of a directed operation. Amounts attributable to events which occurred prior to commencement of a directed operation or which arise out of employee terminations upon the other carrier's cessation of service remain obligations

of that other carrier or its successors. The directed carrier assumes only existing employment obligations and policies and must make payments thereunder only as to events "commencing with and for the duration of" the direction.

While the contention of the Railway Labor Executives' Association that labor protective conditions imposed by Title V of the RRRA are inapplicale to situations requiring action by the Commission under section 1(16)(b) is undoubtedly correct, the employee provisions of section 1(16)(b) do not provide the Commission with broad authority to impose protective conditions upon either the other or the directed carrier. In contrast with an actual abandonment of operations by a railroad, a cessation of services which would precipitate an order under section 1(16)(b) is specifically an action taken without Commission approval. The Commission is empowered under that section merely to respond to the service emergency, to impose only limited direction in terms of track safety standards and reemployment, to promulgate and audit a cost form, and to certify the amount of payment to the Treasury. The Commission authorizes neither the original cessation of service nor the end of the emergency directed operation (which is mandated by the maximum period established in section 1(16)(b)), and thus could not appropriately impose upon either cessation the employee protective conditions prescribed in the *New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271, or any similar conditions where not mandated by statute. Protection will continue to be available to employees under previously imposed conditions or prior agreements.

The Commission anticipates that the involved labor organizations and the carrier parties to a Commission directive will enter into immediate discussions upon notification of a threatened cessation of operations to determine which former employees of the other carrier actually previously performed the services included in the directed operation and must thus be hired by the directed carrier to perform that directed service. Assurances to this effect have been received by the Commission from numerous employee organizations. All parties to such discussions will be bound by the statutory language, as well as by the Commission order and the cost form under consideration herein, which limits those employees to be hired by the directed carrier to those who had actually previously performed the directed service for the other carrier. It is anticipated by the Commission that should operations be directed over only a portion of an existing system, the portion of the total employees of the other carrier which must be hired by the directed carrier will be subject to a commensurate reduction.

In addition to the frequently mentioned concern of all parties with preliminary procedural details, Union Pacific has requested that specific procedures and time limits be established for obtaining final reimbursement and for appeals from any disagreements. Section 1(16)(b) itself specifically requires that reimbursement to the directed carrier, in the amount of the excess of cots of the directed operation over the revenue derived therefrom, shall occur within 90 days after expiration of a Commission directive. With the cooperation of the Secretary of the Treasury and the Congress in seeking and approving a necessary appropriation, the Commission anticipates that reimbursement, to the extent of amounts immediately certified by the Commission to the Treasury, will be obtained within this statutory period. General discussions with the various Federal bodies concerned are underway to assure that such expedited treatment will be available.

Section 1(16)(b) also requires that any Commission action be taken in accordance with the procedures established in section 1(15) of the Interstate Commerce Act. That section specifically exempts actions taken under its auspices from strict procedural requirements and empowers the Commission to act immediately, upon complaint or upon its own initiative, without formal pleadings, with or without notice, hearing, or a report, to respond to emergency situations. Such an immediate response absolutely requires procedural flexibility. While the Commission, by adopting a detailed cost form with accompanying explanatory material, is making every effort to inform involved carriers of any procedural requirements, the Commission also has attempted to avoid unnecessary procedural formalities. Each particular emergency situation will thus be handled on an individual basis, within the guidelines established within the cost form herein, and any appeals from a Commission order will be handled through the Commission's usual appeal procedures, upon an expedited basis.

However, section 1(16)(b) itself imposes certain procedural formalities upon its implementation. Three initial criteria, at least one of which must be satisfied before a directed service order may issue, are imposed; the railroad which intends to cease operations must be found "unable to transport the traffic offered it because (1) its cash position makes its continuing operation impossible; (2) it has been ordered to discontinue service by a court; or (3) it has abandoned service without obtaining a certificate from the Commission . . .". The authority under section 1(16)(b) may be implemented by the Commission whenever the statutory requirements have been met. However, a carrier may submit a written request for such an

order for consideration by the Commission. While this Commission, consistent with the informal procedures available under section 1(15), will not require that any lengthy or formal application be filed to obtain a section 1(16)(b) order a written request should be accompanied by documentation demonstrating that one of the threshold criteria noted above has been satisfied. Additional material showing the current financial status of the carrier, no longer able to provide transportation service, should also be provided to the Commission early in it deliberations. Updated material on threshold criteria and financial status should also be applied in support of any request for an extension of an emergency service order beyond the initial 60-day period.

The proposed cost form. As previously noted, subparagraph (E) of section 1(16)(b) requires the Commission to promulgate by general order the manner and form by which a directed carrier shall currently record the cost of and revenues derived from a directed operation, which shall then be submitted to the Commission for audit and certification to the Treasury. The Commission's original proposed cost form was presented for public comment in accordance with this provision. Those comments, and the changes made in the final cost form pursuant thereto, are discussed below.

Several of the statements submitted in this proceeding express concern with the requirement that the directed carrier keep detailed separations in accounting records to identify revenues and expenses attributable to a directed operation. While recognizing that the existing accounting systems and capabilities of the various carriers differ greatly, the Commission believes that separations in the greatest detail possible are essential to allow it to

perform its audit function and to aid the directed carrier in substantiating expenses or revenues which might be challenged. As the Lehigh Valley suggested, employees of the other carrier who had previously, for that carrier, performed accounting functions in relation to the directed service will be available to the directed carrier for the performance of similar functions, and payments with respect to such employees shall be a compensable cost. Separations will be required at least in the detail indicated in the final cost form as approved herein and underlying records must be maintained.

The proposed cost form includes for each specified account suggested apportionment factors to be used by the directed carrier. Various of the statements herein question the applicability of numerous of these suggested factors. Particular attention is directed toward apportionment of expenses common to directed operations and to the existing operations of the directed carrier. The Commission has given detailed consideration to all objections to particular apportionment factors suggested in the proposed cost form, to alternative factors recommended by the various parties, and to the proposals that all accounts, where possible, be assigned direct. The Commission's analysis covered whether significantly different results would be arrived at with the different factors, whether one factor would provide a more equitable result than another, whether the use of a particular account would simplify accounting procedures for a directed carrier, whether accounts allegedly excluded are covered by existing accounts or should be added to the final cost form herein, and whether direct assignment of certain revenues and expenses would be preferable and possible. In particular, the Commission has adopted several alterna-

tive apportionment factors recommended by interested parties, as provided in the final cost form herein, and has added several accounts not previously specified. It should be noted that the Commission's "suggested" apportionment factors are to be used for the apportionment of common expenses, when appropriate. If such expenses cannot be directly assigned and if the suggested apportionment factors are not available, apportionment should be made on the basis of the most equitable factors. Further, the Commission is in agreement with the Department of Transportation that all expenses should, to the extent possible, be assigned directly, and the final cost form will require that such direct assignments be made unless apportionment of a particular expense can be justified.

The Commission recognizes that additional difficulties may arise in accounting for those expenses which are common to the directed operation and to the existing and continued operations of the directed carrier or to the directed operations by more than one directed carrier over the system of the other carrier. In order to avoid government reimbursement of the directed carrier's own operations or unequal reimbursement of multiple directed carriers, every effort should be made to directly assign that portion of common expenses attributable to the directed operation itself. While only those revenues and expenses directly attributable to a directed operation are to be recorded on the cost form, the directed carrier must maintain detailed records of separations of expenses and revenues showing the directed carrier's own share of common expenses, which shall be made available as supporting material during the Commission audit. A similar system should be adopted where more than one directed carrier is involved. Such separate and direct accounting requirements should not be applied only to line-haul op-

erations but must be applied to all aspects of a directed operation, including terminal and yard operations. For each account, the alternatives of known equitable apportionment factors or those suggested by the Commission in its final cost form should only be used where direct assignment is not possible. Any use of apportionment factors other than those suggested by the Commission must be justified in terms of the lack of applicability of the suggested factors.

Section 1(16)(b), by its treatment of the term "cost", clearly intends that a directed carrier not be forced to bear the financial burden of performance of a directed operation. All "expenditures made or incurred in or attributable to" directed operations shall be included in the calculation of the cost of that operation. Thus the cost of any service performed by the directed carrier on the lines and facilities (owned or leased) of the other carrier pursuant to a Commission directive shall clearly be compensable. Any directly related operations performed by the directed carrier, such as increased switching or greater use of its own connecting yard and terminal facilities, which are necessary to actual provision of the service directed, shall be included in the tabulation of both revenues and expenses to determine the final payment to the directed carrier. Such revenues and expenses shall, of course, be recorded directly wherever possible. If, for its own convenience or for any reason other than a specific Commission directive under section 1(16)(b), the directed carrier transports traffic previously handled by the other carrier over its own lines or over lines of additional carriers, neither the revenues derived from nor the expenses attributable to such an operation shall be considered in calculating the final reimbursement to the directed carrier, as section 1(16)(b) and its cost provisions deal only with the handling, routing, movement, and distribution of traffic over the other carrier's lines.

Revenues derived from the directed operation will, undoubtedly, be readily identifiable. As in the case of expenses of a directed operation, only those revenues directly attributable to such an operation, and not revenues or expenses from tangential operations on the lines of a directed carrier, will be considered. Where the service as directed is identical to that previously performed by the other carrier, existing published divisions of revenues should be used, with the revenue share of the other carrier to be collected by the directed carrier. When outstanding divisions will not suffice, the Commission anticipates that new temporary divisions will be established by the usual method of negotiations between the interested carriers. Such negotiations will hopefully accompany the discussions between the interested carriers held prior to the commencement of a directed operation and should cover, where necessary, divisions between a directed carrier and carriers not involved in a particular directed operation and between two or more directed carriers operating over the system of the other carrier. Such divisions shall, wherever possible, be based upon and related to other existing divisions, and will be subject to ultimate Commission review of their fairness. Only where published divisions are inapplicable and where the carriers involved are absolutely unable to arrive at divisions acceptable to each of them or to the Commission will the Commission actually establish divisions to be used for the duration of a directed operation. As the factors in determining appropriate divisions are complex and vary greatly with each operating situation, the Commission cannot bind

itself or the carriers by delineating specific factors by which any new divisions of revenues must be established. Should the Commission be ultimately forced to determine divisions for particular traffic, numerous factors, including the expense incurred by each carrier in moving certain traffic and the need for simple and rapid methods of calculation, will be considered. All carriers should recognize that detailed accounts substantiating claims to a share of revenue must be kept.

The Commission maintains its position, as stated in the introductory statements to the proposed cost form, that, if state, regional, or local authorities which had previously provided subsidies for portions of the service to be directed wish such services to be continued under a directed operation, those subsidies should be continued. However, several parties to the proceeding herein have recommended that, rather than exclude from the cost of a directed operation those subsidies which are curtailed or discontinued, all subsidies actually paid for operations performed by a directed carrier should be treated and recorded as revenues. Upon consideration of this suggestion, the Commission has revised the final cost form to include operating and other subsidies as revenues, but these revenues will be excluded from the base upon which profit is determined. Any order of the Commission directing the performance of an operation which has previously been subsidized, in whole or in part, from a state, regional, or local source will require that the subsidized service be provided by the directed carrier only so long as and to the extent that the applicable subsidy is continued. Upon notice that such a subsidy has been curtailed or discontinued, the Commission will immediately reconsider that portion of its service order and will then

order the directed carrier to cease the affected operation or will order that the directed operation be continued with all costs of that operation, including those previously covered by the subsidy, to be considered in the calculation of final reimbursement to the directed carrier.

It is anticipated that certain revenues attributable to performance of the directed operation will be outstanding at the completion of any directed operation. As the duties of the directed carrier with respect to these operations will cease in full at that time, either the other carrier or its successor will collect such revenues as they are paid and disburse them to the directed carrier. Such accrued but unpaid revenues shall be included in the calculation of total revenues derived from the directed operation. If the exact amount of such unpaid revenues is not finally determined, an estimated amount, fully documented in terms of prior operations, may be used.

The introductory statements to the proposed cost form include strict limitations upon spending for deferred maintenance and capital expenditures. Several of the parties to this proceeding have requested that the limitations and underlying standards be clarified and that expedited procedures for approval of such expenditures be established.

Section 1(16)(b), in subparagraph (B), specifically states that no Commission order may require a directed carrier to operate in violation of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421). The Commission's term "essential to safety," as used in the introduction to the proposed cost form, recognizes this condition, and expenditures prior to or during a directed operation to maintain railroad facilities within federal safety standards will clearly be

a reimbursable cost of a directed operation. Normal, day-to-day maintenance expenditures to maintain facilities already in compliance with safety standards at existing service levels may be expended and recorded in the proper accounts in the cost form submitted to the Commission. Maintenance costs for normal rolling equipment repair and to prevent an increasing percentage of bad ordered equipment will similarly be recognized as a normal compensable cost of a directed operation. Any expenditures which provide for an actual upgrading or permanent improvement of the facilities of the other carrier, whether to meet safety requirements or for other purposes, will require Commission approval prior to commencement of the work. The need for such Commission approval of sizable expenditures effecting a change in the character or value of the other carrier's property is in accord with the very temporary nature of an order under section 1(16)(b), with the clear Congressional intent to keep necessary government expenditures to a minimum, and with the Commission's conclusion that the carrier which ceased service or its estate should not benefit from directed service under section 1(16)(b) by having the Federal government finance upgrading of its property. On the same principal, such amounts, when approved and expended pursuant to performance of a directed operation, shall be deducted from the net book value upon which rental payments to the other carrier shall be based (see prior discussion).

The limited nature and goals of a section 1(16)(b) directive also mandate that the Commission consider carefully all capital expenditures proposed by a directed carrier. It is anticipated by the Commission that since the performance of most, if not all, directed operations will

not require any capital expenditures by a directed carrier, the possible necessity for such expenditures will be carefully considered by the Commission, and discussed with potential directed carriers, before the scope of a Commission directive is finally determined.

Any application by a directed carrier for approval of capital expenditures or other expenditures for upgrading the other carrier's facilities (whether termed rehabilitation or deferred maintenance) will be handled by the Commission by expedited, informal procedures provided for under section 1(15) and applicable to all questions arising under section 1(16)(b). Expenditures thus approved by the Commission will be recognized as reimbursable costs to be considered in determining final payment to the directed carrier by the Federal government.

Section 1(16)(b) does not authorize the Commission to seek separate, additional appropriations for these or any other cost items. If the directed carrier is unable to finance such approved expenditures from its own resources and must borrow funds from outside sources, interest on such borrowings will be recognized as a compensable cost in accordance with the interest formula discussed below.

The introductory material to the proposed cost form recognizes that a general interest factor should be a part of the calculation of the final reimbursement made to a directed carrier. As modified in the final cost form, an amount of interest shall be inculded in such a final payment which will be based upon the greater of (1) the actual amount of essential operating funds borrowed by the directed carrier within the limits discussed below or (2) the amount by which the total expenses exceed the total gross revenues of the directed operation plus an allowance

for working capital calculated under the cost form's formula. The rate of interest shall be the prime rate at New York City either on the date of the actual borrowing or on an average during the period of the directed operation. The borrowed principal itself will not be treated as a compensable cost item, but will be recognized as a compensable cost by inclusion in the various expense accounts which are recognized and under which the borrowed funds were expended. The amount of an initial borrowing by the directed carrier shall be limited to the amount of loss suffered by the other carrier in the 60 day period in the year prior to the directed operation comparable to the period of the directed operation or any other reasonable limit which the Commission, in discussion with the directed carrier, may establish. Should the amount of the initial borrowing prove insufficient to finance the directed operation, Commission approval must be sought if reimbursement will be sought for the interest on an additional borrowing. A working capital allowance is also included in recognition of the time lag between expenditures for actual performance of a transportation operation and collection of the revenues derived therefrom.

Both the Union Pacific and the AAR question the adequacy of the interest factor contained in the proposed form and suggest factors more favorable to the directed carriers. In establishing the factors to be used in evaluation of the cost overrun of a directed operation, the Commission has endeavored to strike a balance between its Congressional mandate to keep the cost to the Federal government of a directed operation to a minimum and the Congressional intent that any and all directed carriers be made whole at the completion of a particular operation. The factors suggested by both UP and the AAR

would most certainly be advantageous to a directed carrier but would also work as an unjustified drain on the Federal Treasury. The interest factor proposed by the Commission, based upon the New York City prime rate during the period of a directed operation or as of the date of a loan of operating funds is in addition to reimbursement for the borrowed principal through inclusion of that amount in the applicable expense accounts. With repayment of the borrowed principal virtually guaranteed by the Federal government and with the directed carrier's claim to reimbursement by the Federal government assignable to a lending institution, the availability of a loan of necessary operating funds for directed service should not be based solely upon the financial condition of the directed carrier or of railroads in general. It is the Commission's interpretation that, while the Congress intended section 1(16)(b) to protect the directed carrier from bearing the financial burden of a directed operation and to provide that carrier with a "reasonable profit" as determined by the Commission, no intent to guarantee to each directed carrier its maximum return on invested assets can be demonstrated.

Section 1(16)(b) indicates that a factor to be considered in determining the final amount of reimbursement to be paid by the Federal government to a directed carrier shall be "a reasonable profit", which term, according to the available legislative history, shall be defined by the Commission. (Essential Rail Services Continuation Act of 1973. Senate Report 93-302, 1973.) Establishment of this profit factor once again brings into play the conflicting goals of limiting the financial burden from a directed operation to be borne by the Federal government and of adequately reimbursing the directed carrier in accord with

the apparent intent of section 1(16)(b). The Commission has concluded that this profit factor cannot be equated with return on investment, cost of capital, or the directed carrier's profit from its own operations, but is actually a form of compensation to the directed carrier, beyond recovery of expenses and interest for performance of the directed service. By application of the chosen profit factor to revenues rather than to expenses, an incentive to maximize revenues and to operate efficiently is provided to the directed carrier, while unnecessary spending, expansion of common expenses, and the assignment of expenses from the directed carrier's own operations to the directed operation might be encouraged if profit were defined as a percentage of expenses. The United States Department of Transportation recommends a method of profit determination which it believes would provide an even stronger incentive for efficient operation, but the Commission concludes that this proposal would be largely ineffective for short-term operations such as those intended under section 1(16)(b) and that its complexity could result in uneven application in varied situations and probable undue prejudice which could be avoided by use of a simple profit formula.

The proposed cost form establishes 6 percent of total revenues as the appropriate profit factor. Various parties to this proceeding state that 6 percent is either too high or too low. In light of the Commission's conclusion that the profit factor herein should operate as an additional form of compensation to the directed carrier, it need not be tied to the current profit level or return on investment of the directed carrier. After consideration of general railroad profit factors, the short-term, emergency nature of the service involved, and the full reimbursement to the directed carrier from revenues, and by the Federal government, the Commission concludes that 6 percent of total revenues is a reasonable profit for the directed carrier.

Several of the parties to this proceeding have expressed concern with the adequacy of the treatment in the proposed cost form of expenses of various types which might become payable only after completion of a directed operation and submission of the final cost form to the Commission. The proposed cost form recognizes that liabilities arising out of wrecks or derailments, personal injury claims and actions, and damage to or destruction of property should be treated as compensable costs of a directed operation, and recommends that such liabilities be handled through either establishment of a reasonable reserve, with supporting figures, or obtaining the necessary insurance to cover such contingencies. The Commission anticipates that such a reserve would cover all liabilities arising out of directed operation, not only those resulting from wrecks or derailments, which have not been finally determined as of the completion of a directed operation.

Both a reserve and the cost of appropriate insurance could be claimed as reimbursable costs of a directed operation. Ideally, such insurance coverage would be available under or through a slight expansion of insurance already held by the directed carrier. The premiums for such new or additional insurance would be included in the cost form under the appropriate expense accounts as an actual cost of the directed operation, and, at the close of such an operation, if a claim covered by such insurance is outstanding against the directed carrier, the amount of the deductible may be included in a reserve account.

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A reserve account may only be included in the cost form submitted to the Commission if contingent liabilities in excess of or not covered by insurance (plus the deductible amount) have been incurred during the directed operation but have not been finalized in amount. All amounts covered by such a reserve must be fully substantiated. After calculation by the Commission of the immediate payment to the directed carrier to be certified to the Treasury, the amount of the reserve shall be added and included in the appropriation sought from Congress. That amount shall be held in reserve by the Treasury to be dispensed to the directed carrier as contingent liabilities are finalized and certified by the Commission for payment.

As previously noted, the directed carrier will act in the stead of the other carrier for purposes of collection and distribution of all revenues, including interline and per diem payments, and for disbursement of all amounts owing during the period of the directed operation. Should any of these accounts remain unsettled at completion of the directed operation, the appropriate revenue and expense accounts in the cost form should contain estimated amounts which shall be specifically noted and capable of full substantiation. The final payment shall be calculated on the basis of such estimates, which must be approved by the Commission during its audit or revised appropriately, or any unsettled expense accounts, especially those which may be subject to judicial proceedings or arbitration, may be included as a separate component of the reserve for contingent liabilities, as discussed above.

While the cost form, as revised herein, is termed "final", this Commission agrees with the views of certain parties

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that all cost problems which might arise during a particular directed operation cannot be anticipated in a generally applicable form. The original proposed cost form and many of the revisions made in the final form herein are intended to provide parameters to guide directed carriers through admittedly complex accounting procedures and to allow the flexibility necessary for dealing with the peculiarities of each operation. The Commission anticipates that its informal procedures will allow for any necessary changes in the cost form which arise over time or because of the particular circumstances of a directed operation.

The final cost form herein has also been corrected as to those technical errors noted by many of the interested parties.

FINDINGS

We find that Part of Chapter X of Title 49 of the Code of Federal Regulations should be adopted as set forth in the Appendix hereto; that such cost form is in compliance with the requirement placed upon this Commission in subparagraph (E) of section 1(16)(b) of the Interstate Commerce Act, as amended; and that such cost form is lawful.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER CORBER did not participate.

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ORDER

Title 49 — Transportation

Chapter 10 — Interstate Commerce Commission

Subchapter B—Practice and Procedure

Part 1100 — General Rules of Practice

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 14th day of March, 1975.

Ex Parte No. 293 (Sub-No. 3)

Implementation of Public Law 93-236, Section 601(e), Regional Rail Reorganization Act of 1973—Submission of Cost Data to Justify Reimbursement

It appearing, that section 601(e) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701, et seq.) amends section 1(16) of the Interstate Commerce Act (49 U.S.C. 1) by adding a new paragraph (b); that that section requires the Commission to promulgate a general form for recordation and submission to the Commission of the cost incurred in or attributable to performance of emergency services directed by the Commission; and that, pursuant to this requirement, on June 28, 1974, the Commission issued a Notice of Proposed Rulemaking and Order (not printed) which set forth a proposed cost form and explanatory material and which invited comments of that proposal; and

It further appearing, That numerous statements, comments, and recommendations were received by the Com-

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mission with regard to the proposed cost form; that the Commission has given full consideration to all submissions; and that the Commission has made and filed its report herein containing its findings, conclusions, and final cost form, which report is hereby referred to and made a part hereof:

It is ordered, That Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding a new part reading as set forth in the Appendix to said report.

It is further ordered, That this order shall become effective on and shall remain in effect until modified or revoked in whole or in part by further order of the Commission;

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D. C. and by filing a copy with the Director, Office of the Federal Register (49 U.S.C. 301, 302, 304, and 308, 5 U.S.C. 553 and 559).

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

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INSTRUCTION TO APPENDIX A

1. Enter in column (2) the expenses directly assignable to the directed traffic moved. This includes wages, rentals and other expenses paid or incurred by the applicant and chargeable only to the directed traffic.

2. Enter in column (3) the portion of common expenses allocable to the directed traffic. Common expenses means those expenses paid or incurred for the movement of the directed traffic which are common or jointly incurred for the movement of other traffic. All expenses should be assigned direct wherever possible. Expeness not directly assignable should be apportioned on the basis of the factor suggested in column (5) or if necessary, on the basis of a more readily available and equitable factor, if such use is justified to the Commission. The relationship of the carrier's own revenues and the directed traffic revenues is an acceptable apportionment factor in cases where there are no other available apportionment factors.

3. Enter in column (4) the total of columns (2) and (3).

4. The cost of rehabilitation of the line necessary to permit operation should be shown in the maintenance of way accounts. Expenditures for substantial improvements shall require authorization by the Commission.

5. Expenses included in lines 13, 23, 38, 42, 47, and 53 should be identified on a separate sheet.

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APPENDIX

Introductory Statements

The comments and discussions in the report and order of the Commission accompanying this cost form, while not an integral part of the cost form itself, shall be used by a directed carrier applying the cost form as guidance in recording revenues and expenses and as a general statement of Commission policy, subject to revision, regarding emergency directed service under section 1(16)(b) of the Interstate Commerce Act, as amended by section 601(e) of the Regional Rail Reorganization Act of 1973.

The directed carrier must maintain detailed separations in its accounting records to identify the revenues derived from and expenses attributable to the handling, routing, and movement of traffic in compliance with any Commision service order issued under section 1(16)(b). A request for payment must be accompanied by the information documented in this form, and underlying and supporting data must be kept in a separate file to be made available to the Commission for its audit upon request. Such underlying data shall include records of all common expenses and overhead allocations and all figures used to support these allocations. The allocation factors suggested by the Commission shall, in general, be used by the directed carrier, unless use of a different factor can be clearly justified in each particular instance.

Expenditures for deferred maintenance and/or rehabilitation of track, facilities, and equipment of the other carrier, except as essential to safety or to maintain such property at its level of repair at commencement of the directed service, shall not be made and shall not be con-

sidered a cost of the directed operation without prior approval of the Commission. Any capital expenditures, to be recognized as a cost, shall also require prior Commission authorization. Essential and/or approved expenditures shall be directly recorded in the appropriate accounts.

The compensable cost of a directed operation shall not include amounts for wages, salaries, or benefits owed to personnel of the other carrier as a result of events occurring, obligations incurred, or for services rendered prior to the actual day of commencement of the directed operation. Included as a compensable cost of the directed operation shall be all expenditures made by the directed carrier for wages and salaries of and payments for benefits to (1) employees of the other carrier who had previously performed or made essential contributions to the performance of that carrier's service, including but not limited to operating employees, (2) any supervisory personnel or officials of the other carrier whose employment is shown to be essential to performance of the directed operation, and (3) any employees, supervisory personnel, or officials of the directed carrier whose employment is shown to be essential to performance of the directed operation. The term "employees" as used herein shall be defined as in the Railway Labor Act (45 U.S.C. 151) and in reference to orders of this Commission now in effect. The term "supervisory personnel or officials" shall include all those persons in the service of a carrier who performs supervisory or management functions and who are not included in the term "employees" as used herein. Wages, salaries, and payments for benefits shall be separately recorded in the appropriate accounts of the cost form and shall be directly assigned.

It is anticipated that subsidies from state, regional, or local sources normally paid for a service prior to the commencement of a directed operation of that service shall be continued without diminution if the state, regional, or local source of funds expects that service to be continued under a Commission directive. Such subsidies, when paid, shall be recorded in the cost form on line 75 as revenue to the directed carrier but shall not be included in the revenue base (line 74) used to calculate the directed carrier's profit. Should a particular subsidy or subsidies be curtailed or discontinued, the Commissioner shall either (1) order that the service covered by the subsidy no longer be performed by the directed carrier, or (2) order that the service be continued with all expenses incurred in its performance, including those previously covered by the subsidy, to be considered as a compensable cost of the directed operation. A similar determination will be made prior to issuance of an order directing service if the Commission receives notice that a subsidy will be curtailed or discontinued.

Included as a compensable cost of the directed operation shall be a provision for interest on the greater of either (1) the amount by which revenues fall short of the directed carrier's cost in conducting the directed operation plus an amount allocated for working capital or (2) the funds actually and necessarily borrowed to conduct the directed operations. The amount of interest recognized as a cost shall be determined by the average prime rate at New York City during the period of the directed operation for the amount by which the total expenses of the directed operation exceed the gross revenues. On funds actually borrowed to fund the directed operation, the reimbursable interest shall be the New York City

prime rate on the date of the loan agreement. The borrowed principal itself is not a compensable cost item, but should be recorded in the appropriate expense accounts under which it was actually expended. The amount borrowed shall not exceed the loss incurred by the other carrier in performance of those services directed in the comparable 60 day period of the previous calendar year or any other reasonable amount approved by the Commission.

Expenditures made for clearing wrecks and derailments, for injuries to and deaths of persons, and for damage to or destruction of property, including property in transit, caused by or incurred in connection with the directed operations, including cost of investigations and legal expenses, shall be a compensable cost and shall be specified in the appropriate expense accounts. If the actual amounts of damages or necessary expenditures have not been finally determined on the date of submission of the cost form, a reasonable estimate shall be recorded in the cost form with supporting figures included. Upon approval of the estimate by the Commission, that amount, in addition to the amount by which actual expenses exceeded total revenues, shall be certified to the Treasury. Estimated amounts shall be held in a reserve account by the Treasury until the final liability of the directed carrier has been determined and that amount is certified by the Commission to the Treasury for payment. If the directed carrier obtains or adds to its existing insurance to cover such contingencies, the actual cost of such insurance and payments made during the directed operation within the limits of the insurance deductible shall be compensable items of cost and shall be recorded in the appropriate accounts. Payments which may be required of the directed carrier because of liabilities not

finally ascertained at the close of a directed operation, either within the deductible amount or in excess of insurance coverage, may be estimated, approved during the Commission audit, and included in the reserve for contingent liabilities. An estimated amount for expenses of the operation not finally determined at submission of the cost form may also be included in the reserve.

All payments made for rental of lines, facilities, and equipment used in and necessary to the performance of a directed operation shall be treated as a compensable cost and shall be recorded in the appropriate accounts. Such payments may include amounts owed by the directed carrier to the other carrier for use of its properties, amounts payable under outstanding lease agreements for properties previously used by the other carrier for performance of the directed operation, and amounts payable to any carrier or owner, including the directed carrier, for use of rolling equipment necessary to performance of the directed operation.

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APPENDIX A

Line No.	Account No.	Direct	Directed traffic: Common apportioned	Directed traffic: Total	Suggested apportionment factors
	(1)	(2)	(3)	(4)	(5)
	Operating Expenses Maintenance of Way & Structures				
1	202, 212, 214, 216, 218, & 220				Equated track miles
2	227 & 249				Carloads handled
3	231, 233, 247				Revenue tons
4	235				Total Repairs—Expenses
5	229, 237, 239, 241, 243 & 265				Miles of road
6	244				Trailers handled loaded & empty
7	206, 208, 210 & 221				Equated track miles
8	274				Direct
9	201, 275-277 & 282				Accounts 202-265
10	266, 267, 269-273 & 281				Miles of road
11	253 & 257				Accts. 311 and 314—Expenses*
12	278 & 279				Miles of track
13	All other expenses		xxx		Direct
14	Total of M. of W&S	xxx	xxx		—
	Maintenance of Equipment				
15	311 (Yard)				Locomotive unit-miles
16	311 (other)				Gross ton-miles
17	314				Frt. train car-miles cars-loaded and empty
18	317				Pass. train car-miles

* Railroads having electrified systems should use electric locomotive unit-miles.

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Line No.	Account No.	Direct	Directed traffic: Common apportioned	Directed traffic: Total	Suggested apportionment factors
	(1)	(2)	(3)	(4)	(5)
19	318				Vehicle miles loaded and empty
20	323				Number of carloads handled
21	301, 326, 328, 332-335 & 339				Total repairs—expenses
22	302, 304, 305, 306, 329, 331, 336 & 337				Total repairs—expenses
23	All other expenses		xxx		Direct
24	Total of M of E	xxx	xxx		—
	Transportation				
25	372				Train-miles
26	373				Revenue-tons
27	389				Yard switching locomotive unit-miles
28	371, 409-411, 414 & 420				Accounts 372, 373, 376 & 389—expenses
29	404-407 & 415-419				Train-miles
30	376				Revenue-tons
31	374, 375, 408		xxx		Direct
32	377-380, 382-384, 388, 390 & 391				Yard switching locomotive unit-miles
33	392 & 401				Accounts 392 & 401 Direct assignments*
34	394-396, 400, 412 & 413				Locomotive unit-miles including train switching
35	402				Frt. train car-miles loaded & empty incl. caboose
36	403				Pass. train car-miles
37	421 & 422				Trailers handled-loaded & empty

* Assign Train enginemen and Trainmen expenses direct to carrier's own traffic and directed traffic. Apportion common expenses on the basis of direct assignments of Accounts 392 and 401.

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Line No.	Account No. (1)	Direct (2)	Directed traffic: Common apportioned (3)	Directed traffic: Total (4)	Suggested apportionment factors (5)
38	All other expenses				Direct
39	Total transportation	xxx	xxx		—
	Miscellaneous Operations				
40	449		xxx		Direct
41	441-448				Apportion according to local condition
42	All other expenses		xxx		Direct
43	Total Misc.	xxx	xxx		—
	General and Traffic Expenses				
44	456		xxx		Direct
45	451-455, 457-462				Apportion on the basis of total expenses lines 14, 24, 39 and 43
46	351-360				Accts. 451-462—Expenses
47	All other expenses				Direct
48	Total General and Traffic				—
49	Total expenses Lines 14, 24, 39, 43 and 48	xxx	xxx		—
	532 Railway Tax Accruals				
50	Payroll taxes		xxx		Direct
51	Property taxes				Miles of road
52	State Income taxes		xxx		Direct
53	Other taxes excl. Income Taxes				Miles of road
54	Total taxes, lines 50-53	xxx	xxx		—

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Line No.	Account No. (1)	Direct (2)	Directed traffic: Common apportioned (3)	Directed traffic: Total (4)	Suggested apportionment factors (5)
	Rent Income				
55	503				Car-Miles
56	504 & 506				Assign where applicable
57	505				Assign where applicable
58	507				Non-revenue ton-miles
59	508				Assign where applicable
60	Total rent income lines 55-59	xxx	xxx		—
	Rent Payable				
61	536				Car-miles
62	537				Locomotive unit-miles
63	538				Assign where applicable
64	539				Assign where applicable
65	540				Non-revenue ton-miles
66	541				Assign where applicable
67	542				Assign where applicable
68	543				Assign where applicable
69	Total rents payable lines 61-68	xxx	xxx		—
70	551	xxx	xxx		Direct
71	Total expenses, rents and taxes, lines 49 and 54 less 60 plus 69 & 70	xxx	xxx		—
	Revenues				
72	101	xxx	xxx		Actual
73	102	xxx	xxx		Actual
74	All other	xxx	xxx		Actual
75	Total Revenues	xxx	xxx		—

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Line No.	Account No.	Direct	Directed traffic		Suggested apportionment factors
			Common apportioned	Total	
	(1)	(2)	(3)	(4)	(5)
76	Local/state subsidies	xxx	xxx		Actual
77	Total Income Line 75 and line 76	xxx	xxx		—
78	Total expenses over income (line 71-line 77)	xxx	xxx		—
	Computation of reimbursement				
79	Allowance for profit, line 75 x .06[1]	xxx	xxx		—
80	Working Capital[2]	xxx	xxx		—
81	Total deficiency plus working capital (line 78 plus line 80)	xxx	xxx		—
82	Amount borrowed[3]	xxx	xxx		—
83	Interest allowed[4]	xxx	xxx		—
84	Total expenses plus profit plus interest (lines 71, 79 and 83)	xxx	xxx		—
85	Reimbursement including an allowance for profit (line 84 minus line 77)[5]	xxx	xxx		—

[1] Profit is based on 6% of total revenues (line 75). A profit from actual operations above 6% of total revenues may be retained by the directed carrier and no amount for profit will be paid by the Federal Government. Should a profit of less than 6% be earned, the difference between 6% and that % will be paid.

[2] Total expenses in line 71 divided by the total days of the directed operation. Multiply these expenses by a factor of 15 (days) to represent the lag between cash receipts and cash payments.

[3] The amount borrowed should not exceed the permissible limits established in the Ex Parte 293 (Sub-No. 3) report, unless specifically approved by the Commission.

[4] Apply the average prime rate (per annum) in effect at New York City to line 81, or the prime rate (per annum) in effect at New York City on the date of the loan agreement to line 82, whichever is greater. However, the interest allowed on amounts actually borrowed shall not exceed the amount of interest charged on the loan, if less than the applicable prime rate.

[5] If line 77 is larger than line 84, enter zero.

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ATTENTION: Knowing and willful misstatements or omissions of material facts constitute federal criminal violations punishable by up to five years imprisonment and fines of up to $10,000 for each offense. (See 18 U.S.C. 1001, 1003, 287.)

Each person by whom this document is signed certifies that the representations appearing herein and in the appendices attached hereto (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete, based upon all the information required to be included therein, of which he has any knowledge.

Dated this _____ day of _____, 19 ___.

_____

(Signature of Accounting Officer)

By _____

_____

(Title)

APPENDIX D

Corrected Order of the Interstate Commerce Commission

Title 49—Transportation

Chapter 10—Interstate Commerce Commission

Subchapter B—Practice and Procedure

Parts 1120-1129—Special Procedures: Railcarriers

Certificate of Public Convenience and Necessity

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 14th day of March, 1975.

Ex Parte No. 293 (Sub-No. 3)

Implementation of Public Law 93-236, Section 601(e), Regional Rail Reorganization Act of 1973—Submission of Cost Data to Justify Reimbursement

It appearing, That section 601(e) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 701, et seq.) amends section 1(16) of the Interstate Commerce Act (49 U.S.C. 1) by adding a new paragraph (b); that that section requires the Commission to promulgate a general form for recordation and submission to the Commission of the cost incurred in or attributable to performance of emergency services directed by the Commission; and that, pursuant to this requirement, on June 28, 1974, the Commission issued a Notice of Proposed Rulemaking and Order (not printed) which set forth a proposed cost form and explanatory material and which invited comments of that proposal; and

It further appearing, That numerous statements, comments, and recommendations were received by the Commission with regard to the proposed cost form; that the Commission has given full consideration to all submissions; and that the Commission has made and filed its report herein containing its findings, conclusions, and final cost form, which report is hereby referred to and made a part hereof:

It is ordered, That Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding a new part 1126—Submission of Cost Data to Justify Reimbursement for Directed Service, reading as set forth in the Appendix to said report.

It is further ordered, That this order shall become effective on and shall remain in effect until modified or revoked in whole or in part by further order of the Commission;

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register (49 U.S.C. 301, 302, 304, and 308, 5 U.S.C. 553 and 559).

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Appendix D

and to allow the flexibility necessary for dealing with the peculiarities of each operation. The Commission anticipates that its informal procedures will allow for any necessary changes in the cost form which arise over time or because of the particular circumstances of a directed operation.

The final cost form herein has also been corrected as to those technical errors noted by many of the interested parties.

FINDINGS

We find that Part 1126 of Chapter X of Title 49 of the Code of Federal Regulations should be adopted as set forth in the Appendix hereto; that such cost form is in compliance with the requirement placed upon this Commission in subparagraph (E) of section 1(16)(b) of the Interstate Commerce Act, as amended; and that such cost form is lawful.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

Corrected

APPENDIX E

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1518

LEHIGH AND NEW ENGLAND RAILWAY COMPANY,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES,

Respondents,

COMMONWEALTH OF PENNSYLVANIA,

Intervenor.

On Petition for Review of the Order of the Interstate Commission

Present: ADAMS, HUNTER and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the Interstate Commerce Commission and was argued by counsel.

Appendix E

On consideration whereof, it is now here ordered and adjudged by this Court that the Petition to review and set aside the cost reimbursement regulations of the Interstate Commerce Commission insofar as they do not provide, except for profitable operations, for the payment of rent to the other carrier is denied. Costs are taxed against the petitioner.

ATTEST:

THOMAS F. QUINN
Clerk

June 9, 1976

Certified as a true copy and issued in lieu
of a formal mandate on July 16, 1976.

Test:
THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX F

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1518

LEHIGH AND NEW ENGLAND RAILWAY COMPANY,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES,
Respondents,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

Appendix F

The petition for rehearing filed by Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JAMES HUNTER, III,
Judge.

Dated: July 8, 1976

APPENDIX G

49 U.S.C. §1(16)(b), §601(e) of the Regional Rail Reorganization Act of 1973, as Amended

(b) Whenever any carrier by railroad is unable to transport the traffic offered it because—

(1) its cash position makes its continuing operation impossible;

(2) it has been ordered to discontinue any service by a court; or

(3) it has abandoned service without obtaining a certificate from the Commission pursuant to this section;

the Commission may, upon the same procedure as provided in paragraph (15) of this section, make such just and reasonable directions with respect to the handling, routing and movement of the traffic available to such carrier and its distribution over such carrier's lines, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people subject to the following conditions:

(A) Such direction shall be effective for no longer than 60 days unless extended by the Commission for cause shown for an additional designated period not to exceed 180 days.

(B) No such directions shall be issued that would cause a carrier to operate in violation of the Federal Railroad Safety Act of 1970 or that would substantially impair the ability of the carrier so directed to serve adequately its own patrons or to meet its outstanding common carrier obligations.

(C) The directed carrier shall not, by reason of such Commission direction, be deemed to have assumed or to become responsible for the debts of the other carrier.

(D) The directed carrier shall hire employees of the other carrier to the extent such employees had previously performed the directed service for the other carrier, and, as to such employees as shall be so hired, the directed carrier shall be deemed to have assumed all existing employment obligations and practices of the other carrier relating thereto, including, but not limited to, agreements governing rate of pay, rules and working conditions, and all employee protective conditions commencing with and for the duration of the direction.

(E) Any order of the Commission entered pursuant to this paragraph shall provide that if, for the period of its effectiveness, the cost, as hereinafter defined, of handling, routing, and moving the traffic of another carrier over the other carrier's lines of road shall exceed the direct revenues therefor, then upon request, payment shall be made to the directed carrier, in the manner hereinafter provided and within 90 days after expiration of such order, of a sum equal to the amount by which such cost has exceeded said revenues. The term "cost" shall mean those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit. Such cost shall be then currently recorded by the carrier or carriers in such manner and on such forms as by general

order may be prescribed by the Commission and shall be submitted to and subject to audit by the Commission. The Commission shall certify promptly to the Secretary of the Treasury the amount of payment to be made to said carrier or carriers under the provisions of this paragraph. Payments required to be made to a carrier under the provisions of this paragraph shall be made by the Secretary of the Treasury from funds hereby authorized to be appropriated in such amounts as may be necessary for the purpose of carrying out the provisions hereof.

APPENDIX H

Corrected Revised Service Orders Nos. 1207 and 1208

Title 49 — Transportation

Chapter X — Interstate Commerce Commission

Subchapter A — General Rules and Regulations

Part 1033 — Car Service

Corrected Revised Service Order No. 1207

Lehigh Valley Railroad Company (Robert C. Haldeman, Trustee) Directed to Operate Certain Portions of Lehigh and New England Railway Company

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 17th day of March, 1975.

It appearing, That the Lehigh and New England Railway Company (LNE) has notified the Commission that, on or before January 24, 1975, it will be unable to transport the traffic offered it because its cash position makes continued operation impossible; and that, accordingly, the LNE has placed its embargo No. 1-75 against all traffic, effective January 7, 1975;

It further appearing, That the imminent cessation of all transportation services by the LNE constitutes an emergency situation such as that contemplated by section 1(16)(b) of the Interstate Commerce Act (49 U.S.C. 1 (16)), as amended, by section 601 (e) of the Regional Rail Reorganization Act of 1973 (P.L. 93-236); and that section authorizes the Commission under certain prescribed conditions, to direct a carrier or carriers by railroad to perform essential transportation services which another carrier is no longer able to perform;

It further appearing, That the legislative history to section 1(16)(b) indicates that its purpose is to assure the continuance of essential rail service for a period of sixty days, or in extraordinary circumstances for an extended period not to exceed 240 days, in the event that a railroad is required to cease operation under conditions described in the Act; and that such authority was intended as an interim emergency measure and not as a permanent solution;

It further appearing, That in determining whether the LNE should be operated pursuant to the authority of section 1(16)(b) and in its planning therefore, the Commission, consistent with Congressional intent and the provisions of the Emergency Rail Services Act of 1970 (45 U.S.C. 661), has coordinated its activities with the Department of Transportation and has been in consultation with representatives of the United States Railway Association, among others;

It further appearing, That the Commission has determined that based upon the statute and the directives contained in the legislative history of section 1(16)(b) of the Act, the operation of the lines of the LNE is necessary and such operation is in the public interest; that the Commission considered many factors, including but not limited to: the transportation requirements of the patrons of the LNE, the economic impact of a discontinuance of service, the amount of originating and terminating traffic on individual lines, transportation requirements of connecting carriers, condition of track, alternative carriers and transportation modes, and net operating revenues attributable to individual lines; and that, the Commission should direct a carrier to operate over the lines of the LNE;

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It further appearing, That the Lehigh Valley Railroad Company (Robert C. Haldeman, Trustee) (LV) should be directed to provide the services herein determined to be essential in the public interest, which were formerly performed by the LNE, because, among other things, the LV's proximity to the lines of the LNE, the volume of the traffic LNE interchanges with the LV, its familiarity with the operation of the LNE and its willingness and ability to perform the services required for shippers;

It further appearing, That the performance of the operations directed herein will not substantially impair the LV's ability adequately to serve its own patrons or to meet its outstanding common carrier obligations; that the performance of the directed operation should not violate the provisions of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421);

It further appearing, That in light of the emergency situation which would result from a cessation of all transportation service by the LNE, public notice and hearings are impractical and not required by the procedures set forth in section 1(15) of the Act; that the public interest requires the continuation of operation over certain lines of the LNE by the LV for a period of operation of *150 days as provided by section 1(16)(b) of the Act; and that good cause exists for making this order effective upon the date served;

It further appearing, That the LV is presently a railroad in reorganization under section 77 of the Bankruptcy Act (11 U.S.C. 205) subject to the jurisdiction of the United States District Court for the Eastern District of Pennsylvania; and that, accordingly, approval of said court may be necessary for the implementation of this order; and

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It further appearing, and the Division so finds, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

It further appearing, and the Division so finds, that cessation of service by the LNE would have serious economic consequences not only to the patrons of the LNE but also to the communities located within the area; and for good cause appearing therefore:

§1033.1207 Lehigh Valley Railroad Company (Robert C. Haldeman, Trustee) Directed to Operate Certain Portions of Lehigh and New England Railway Company

(a) *It is ordered,* That the Lehigh Valley Railroad Company, debtor, (Robert C. Haldeman, Trustee), be, and it is hereby directed to enter upon the railroad properties presently operated by the Lehigh and New England Railway Company, except the Tamaqua branch, extending between Tamaqua, Pennsylvania, and Hauto, Pennsylvania, and to operate such railroad and facilities subject to any necessary approval of the reorganization court of the United States District Court for the Eastern District of Pennsylvania, for the purpose of handling, routing, and moving the traffic of the Lehigh and New England Railway Company in accordance with the lawful instructions of shippers and consignees and in compliance with the rules and regulations of the Commission, and subject to the rates and charges prescribed in tariffs lawfully published and filed in accordance with law and applicable to freight traffic transported over the lines of the Lehigh and New England Railway Company; that such entry and operations shall commence on or before 12:01 a.m.,

January 24, 1975, and shall continue for a period of 150 days, unless such period is reduced by order of the Commission or unless further extended by order of the Commission for cause shown, for an additional designated period; and that a certified copy of the order of the court authorizing the Lehigh Valley Railroad Company, debtor, to perform the directed service pursuant to the order of the Commission shall be filed with this Commission, with appropriate reference to this proceeding;

(b) *It is further ordered,* That the Lehigh and New England Railway Company shall, on the date of service of this order inform all persons who were given notice of its embargo No. 1-75, that said embargo shall no longer be applicable to service over its lines;

(c) *It is further ordered,* That the Lehigh Valley Railroad Company, debtor, shall (1) collect all revenues attributable to the handling, routing, and movement of freight traffic including all agents' and conductors' accounts and all payments from other carriers collected after the commencement of directed operations; (2) distribute such revenues in accordance with divisional agreements presently applicable, collecting and paying to the Lehigh and New England Railway Company the divisions of joint revenues payable to the Lehigh and New England Railway Company pursuant to such division agreements which are derived from services performed and events occurring prior to January 24, 1975, and collecting and retaining for the Lehigh Valley Railroad Company, debtor, on a segregated basis all such divisions of joint revenues payable to the Lehigh and New England Railway Company pursuant to such division agreements which are derived from services performed by the Lehigh Valley

Railroad Company, debtor, in the place and stead of the Lehigh and New England Railway Company and from events occurring on or after January 24, 1975;

(d) *It is further ordered,* That all carriers are hereby directed to pay to the Lehigh Valley Railroad Company, debtor, such sums as otherwise would be payable to the Lehigh and New England Railway Company including interline freight revenues, per diem, and all other interline accounts of whatsoever kind and nature coming due under normal accounting rules and procedures for the settlement of interline transactions and accounts between carriers during the period this order is in effect and thereafter coming due for services performed and events occurring during the period of directed service.

(e) *It is further ordered,* That the Lehigh Valley Railroad Company, debtor, shall pay to all carriers amounts received by it but due to them for services performed by them, for per diem, and for events occurring either prior to the commencement of operations directed herein or during the period this order is in effect, all in accordance with established procedures for the settlement of interline transactions and accounts between carriers;

(f) *It is further ordered,* That the Lehigh Valley Railroad Company, debtor, be, and it is hereby, authorized to act on behalf of the Lehigh and New England Railway Company in all matters pertaining to the establishment of rates, routes and divisions applicable to that portion of the LNE operated by the LV as defined in paragraph (a) herein, including the publication or amendment of tariffs, division sheets, etc.

(g) *It is further ordered,* That in executing the directions of this Commission as provided for in this order, all carriers involved in the movement of traffic to the lines of the Lehigh and New England Railway Company shall proceed even though in some instances, no contracts, agreements or arrangements now exist between them with reference to the divisions of the rates of transportation applicable to said traffic; that in the event reroutings are necessary pursuant to the directives of this and subsequent orders, the divisions shall be, during the time this order remains in force, those voluntarily agreed upon by and between said carriers, or upon failure of the carriers to so agree said divisions shall be those hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by the Interstate Commerce Act;

(h) *It is further ordered,* That, in carrying out the operations directed herein, the Lehigh Valley Railroad Company, debtor, shall hire employees of the Lehigh and New England Railway Company to the extent such employees had previously performed the directed service and shall assume all existing employment obligations and practices of the Lehigh and New England Railway Company relating thereto, including, but not limited to, agreements governing rates of pay, rules, working conditions, and all current employee protective conditions, for the duration of the directed service;

(i) *It is further ordered,* That the Lehigh Valley Railroad Company, debtor, and the Lehigh and New England Railway Company shall, if possible, negotiate an agreement (hereinafter called the agreement) on all aspects of the directed operation subject to their determination, including, but not limited to use of and rental for equipment, use of, and compensation for, existing inventories of fuel, materials, and supplies, and rental for the use of rights-of-way and other rail facilities; that the Commission shall be represented at all such discussions; that the agreement shall be subject to approval by the Commission upon such procedure as the Commission shall later specify; and that in the event the Lehigh Valley Railroad Company, debtor, and the Lehigh and New England Railway Company fail to agree upon the terms for such use and compensation, the directed service shall continue pending a Commission determination to establish such terms as it may find to be just and reasonable;

(j) *It is further ordered,* That in the event the parties achieve agreement, any funds to be paid the Lehigh and New England Railway Company thereunder shall be paid into an escrow account until the agreement is given approval by the Commission; and that in the event the parties are unable to reach agreement, any monies the Lehigh Valley Railroad Company, debtor, holds for the account of the Lehigh and New England Railway Company to compensate it for the use of its equipment and facilities and properties, in lieu of a final agreement, shall be paid into an escrow account until a determination has been made by the Commission as to what terms are just and reasonable;

(k) *It is further ordered,* That the Lehigh Valley Railroad Company, debtor, shall record the revenues earned and the costs incurred in and for the performance of the operations directed herein over the lines of the Lehigh and New England Railway Company, in a manner to be

prescribed by the Commission, that the information so recorded, and supporting data where specifically required, shall be submitted by the Lehigh Valley Railroad Company, debtor, to the Commission for audit and evaluation immediately upon completion of the directed operation, or at such intervals, during the period of the directed operation, as the Commission may request; and that if for the period during which this order shall be effective, the cost to the Lehigh Valley Railroad Company, debtor, of handling, routing, and moving the traffic over the lines of the Lehigh and New England Railway Company shall exceed the direct revenues therefor, payment shall be made to the Lehigh Valley Railroad Company, debtor, in the manner provided by section 1(16)(b) of the Act;

(l) *It is further ordered,* That the Commission shall retain jurisdiction to modify, supplement or reconsider this order at any time and for such purposes as it may consider necessary consistent with the legislative intent and the express provision of section 1(16)(b) of the Interstate Commerce Act, as amended;

(m) *It is further ordered,* That this order shall be served upon the United States Department of Transportation, the United States Railway Association, the Rail Planning Services Office of the Interstate Commerce Commission, the governor of the State of Pennsylvania, Pennsylvania Public Utilities Commission, the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by de-

positing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

(n) *It is further ordered,* That this order shall be effective upon the date of service; that the operations which the Lehigh Valley Railroad Company, debtor, is herein directed to perform shall commence on or before 12:01 a.m., January 24, 1975; and that such operations shall cease 150 days from the date the directed service shall be instituted by the Lehigh Valley Railroad Company, debtor, at 11:59 p.m., unless otherwise extended, modified, changed, or suspended by subsequent order of the Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2).)

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

(SEAL)

• Correction

Appendix H

Corrected Revised Service Order No. 1208

TITLE 49—TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 1033—CAR SERVICE

Reading Company, Andrew L. Lewis, Jr., and Joseph L. Castle, Trustees, Directed to Operate Certain Portions of Lehigh and New England Railway Company

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 17th day of March, 1975.

It appearing, That the Lehigh and New England Railway Company (LNE) has notified the Commission that, on or before January 24, 1975, it will be unable to transport the traffic offered it because its cash position makes continued operation impossible; and that, accordingly, the LNE has placed its embargo No. 1-75 against all traffic, effective January 7, 1975;

It further appearing, That the imminent cessation of all transportation services by the LNE constitutes an emergency situation such as that contemplated by section 1(16)(b) of the Interstate Commerce Act (49 U.S.C. 1(16)), as amended, by section 601 (e) of the Regional Rail Reorganization Act of 1973 (P.L. 93-236); and that section authorizes the Commission under certain prescribed conditions, to direct a carrier or carriers by railroad to perform essential transportation services which another carrier is no longer able to perform;

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It further appearing, That the legislative history to section 1(16)(b) indicates that its purpose is to assure the continuance of essential rail service for a period of sixty days, or in extraordinary circumstances for an extended period not to exceed 240 days, in the event that a railroad is required to cease operation under conditions described in the Act; and that such authority was intended as an interim emergency measure and not as a permanent solution;

It further appearing, That in determining whether the LNE should be operated pursuant to the authority of section 1(16)(b) and in its planning therefore, the Commission, consistent with Congressional intent and the provisions of the Emergency Rail Services Act of 1970 (45 U.S.C. 661), has coordinated its activities with the Department of Transportation and has been in consultation with representatives of the United States Railway Association, among others;

It further appearing, That the Commission has determined that based upon the statute and the directives contained in the legislative history of section 1(16)(b) of the Act, the operation of the lines of the LNE is necessary and such operation is in the public interest; that the Commission considered many factors, including but not limited to: the transportation requirements of the patrons of the LNE, the economic impact of a discontinuance of service, the amount of originating and terminating traffic on individual lines, transportation requirements of connecting carriers, condition of track, alternative carriers and transportation modes, and net operating revenues attributable to individual lines; and that, the Commission should direct a carrier to operate over the lines of the LNE;

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It further appearing, That the Reading Company, Andrew L. Lewis, Jr., and Joseph L. Castle, Trustees (Rdg) should be directed to provide the services herein determined to be essential in the public interest, which were formerly performed by the LNE, because, among other things, the Rdg's proximity to the lines of the LNE, the volume of the traffic LNE interchanges with the Rdg, its familiarity with the operation of the LNE and its willingness and ability to perform the services required for shippers;.

It further appearing, That the performance of the operations directed herein will not substantially impair the Rdg's ability adequately to serve its own patrons or to meet its outstanding common carrier obligations; that the performance of the directed operation should not violate the provisions of the Federal Railroad Safety Act of 1970 (45 U.S.C. 421);

It further appearing, That in light of the emergency situation which would result from a cessation of all transportation service by the LNE, public notice and hearings are impractical and not required by the procedures set forth in section 1(15) of the Act; that the public interest requires the continuation of operation over certain lines of the LNE by the Rdg for a period of operation of *150 days as provided by section 1(16)(b) of the Act; and that good cause exists for making this order effective upon the date served;

It further appearing, That the Rdg is presently a railroad in reorganization under section 77 of the Bankruptcy Act (11 U.S.C. 205) subject to the jurisdiction of the United States District Court for the Eastern District of

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Pennsylvania; and that, accordingly, approval of said court may be necessary for the implementation of this order; and

It further appearing, and the Division so finds, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

It further appearing, and the Division so finds, that cessation of service by the LNE would have serious economic consequences not only to the patrons of the LNE but also to the communities located within the area; and for good cause appearing therefore:

§1033.1208 Reading Company, Andrew L. Lewis, Jr., and Joseph L. Castle, Trustees, Directed to Operate Certain Portions of Lehigh and New England Railway Company

(a) *It is ordered,* That the Reading Company, Andrew L. Lewis, Jr., and Joseph L. Castle, Trustees (Rdg), be, and it is hereby directed to enter upon that portion of the Tamaqua branch of the Lehigh and New England Railway (LNE) extending between milepost 2.20 west of Hauto, Pennsylvania, and a connection with the Reading Company at milepost 6.55 in the vicinity of Tamaqua, Pennsylvania, and to operate such railroad and facilities subject to any necessary approval of the reorganization court of the United States District Court for the Eastern District of Pennsylvania, for the purpose of handling, routing, and moving the traffic of the Lehigh and New England Railway Company in accordance with the law-

ful instructions of shippers and consignees and in compliance with the rules and regulations of the Commission, and subject to the rates and charges prescribed in tariffs lawfully published and filed in accordance with law and applicable to freight traffic transported over the lines of the Lehigh and New England Railway Company; that such entry and operations shall commence on or before 12:01 a.m., January 24, 1975, and shall continue for a period of 150 days, unless such period is reduced by order of the Commission or unless further extended by order of the Commission, for cause shown, for an additional designated period; and that a certified copy of the order of the court authorizing the Reading Company to perform the directed service pursuant to the order of the Commission shall be filed with this Commission, with appropriate reference to this proceeding;

(b) *It is further ordered,* That the Lehigh and New England Railway Company shall, on the date of service of this order inform all persons who were given notice of its embargo No. 1-75, that said embargo shall no longer be applicable to service over its lines;

(c) *It is further ordered,* That the Reading Company shall (1) collect all revenues attributable to the handling, routing, and movement of freight traffic including all agents' and conductors' accounts and all payments from other carriers collected after the commencement of directed operations; (2) distribute such revenues in accordance with divisional agreements presently applicable, collecting and paying to the Lehigh and New England Railway Company the divisions of joint revenues payable to the Lehigh and New England Railway Company pursuant to such division agreements which are derived from services performed and events occurring prior to January 24, 1975, and collecting and retaining for the Reading Company on a segregated basis all such divisions of joint revenues payable to the Lehigh and New England Railway Company pursuant to such division agreements which are derived from services performed by the Reading Company in the place and stead of the Lehigh and New England Railway Company and from events occurring on or after January 24, 1975;

(d) *It is further ordered,* That all carriers are hereby directed to pay to the Reading Company, such sums as otherwise would be payable to the Lehigh and New England Railway Company including interline freight revenues, per diem, and all other interline accounts of whatsoever kind and nature coming due under normal accounting rules and procedures for the settlement of interline transactions and accounts between carriers during the period this order is in effect and thereafter coming due for services performed and events occurring during the period of directed service;

(e) *It is further ordered,* That the Reading Company shall pay to all carriers amounts received by it but due to them for services performed by them, for per diem, and for events occurring either prior to the commencement of operations directed herein or during the period this order is in effect, all in accordance with established procedures for the settlement of interline transactions and accounts between carriers;

(f) *It is further ordered,* That the Reading Company be, and it is hereby, authorized to act on behalf of the

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Lehigh and New England Railway Company in all matters pertaining to the establishment of rates, routes and divisions applicable to that portion of the LNE operated by the Rdg as defined in paragraph (a) herein, including the publication or amendment of tariffs, division sheets, etc.;

(g) *It is further ordered,* That in executing the directions of this Commission as provided for in this order, all carriers involved in the movement of traffic to the lines of the Lehigh and New England Railway Company shall proceed even though in some instances, no contracts, agreements or arrangements now exist between them with reference to the divisions of the rates of transportation applicable to said traffic; that in the event reroutings are necessary pursuant to the directives of this and subsequent orders, the divisions shall be, during the time this order remains in force, those voluntarily agreed upon by and between said carriers, or upon failure of the carriers to so agree said divisions shall be those hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by the Interstate Commerce Act;

(h) *It is further ordered,* That, in carrying out the operations directed herein, the Reading Company shall hire employees of the Lehigh and New England Railway Company to the extent such employees had previously performed the directed service and shall assume all existing employment obligations and practices of the Lehigh and New England Railway Company relating thereto, including, but not limited to, agreements governing rates of pay, rules, working conditions, and all current employee protective conditions, for the duration of the directed service;

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(i) *It is further ordered,* That the Reading Company and the Lehigh and New England Railway Company shall, if possible, negotiate an agreement (hereinafter called the agreement) on all aspects of the directed operation subject to their determination, including, but not limited to use of and rental for equipment, use of, and compensation for, existing inventories of fuel, materials, and supplies, and rental for the use of rights-of-way and other rail facilities; that the Commission shall be represented at all such discussions; that the agreement shall be subject to approval by the Commission upon such procedure as the Commission shall later specify; and that in the event the Reading Company and the Lehigh and New England Railway Company fail to agree upon the terms for such use and compensation, the directed service shall continue pending a Commission determination to establish such terms as it may find to be just and reasonable;

(j) *It is further ordered,* That in the event the parties achieve agreement, any funds to be paid the Lehigh and New England Railway Company thereunder shall be paid into an escrow account until the agreement is given approval by the Commission; and that in the event the parties are unable to reach agreement, any monies the Reading Company holds for the account of the Lehigh and New England Railway Company to compensate it for the use of its equipment and facilities and properties, in lieu of a final agreement, shall be paid into an escrow account until a determination has been made by the Commission as to what terms are just and reasonable;

(k) *It is further ordered,* That the Reading Company shall record the revenues earned and the costs incurred

in and for the performance of the operations directed herein over the lines of the Lehigh and New England Railway Company, in a manner to be prescribed by the Commission, that the information so recorded, and supporting data where specifically required, shall be submitted by the Reading Company to the Commission for audit and evaluation immediately upon completion of the directed operation, or at such intervals, during the period of the directed operation, as the Commission may request; and that, if, for the period during which this order shall be effective, the cost to the Reading Company of handling, routing, and moving the traffic over the lines of the Lehigh and New England Railway Company shall exceed the direct revenues therefor, payment shall be made to the Reading in the manner provided by section 1(16)(b) of the Act;

(l) *It is further ordered,* That the Commission shall retain jurisdiction to modify, supplement or reconsider this order at any time and for such purposes as it may consider necessary consistent with the legislative intent and the express provision of section 1(16)(b) of the Interstate Commerce Act, as amended;

(m) *It is further ordered,* That this order shall be served upon the United States Department of Transportation, the United States Railway Association, the Rail Planning Services Office of the Interstate Commerce Commission, the governor of the State of Pennsylvania, Pennsylvania Public Utilities Commission, the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the

American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

(n) *It is further ordered,* That this order shall be effective upon the date of service; that the operations which the Reading Company is herein directed to perform shall commence on or before 12:01 a.m., January 24, 1975; and that such operations shall cease 150 days from the date the directed service shall be instituted by the Reading Company at 11:59 p.m., unless otherwise extended, modified, changed, or suspended by subsequent order of the Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Sects. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2).)

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

(SEAL)

• Correction

Supreme Court, U. S.
FILED
JAN 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-490

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEHIGH AND NEW ENGLAND RAILWAY COMPANY,
PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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LEHIGH AND NEW ENGLAND RAILWAY COMPANY,
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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 540 F. 2d 71. The regulations of the Interstate Commerce Commission (Pet. App. 26a-36a) are codified as 49 C.F.R. Part 1126. The order promulgating the regulations and the supporting report (Pet. App. 37a-93a) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 97a-98a) was entered on June 9, 1976. A timely petition for rehearing was denied on July 8, 1976 (Pet. App. 99a-100a). The petition for a writ of certiorari was filed on October 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations of the Interstate Commerce Commission, which provide that a rail carrier directed to provide service over the lines of a defaulting carrier will ordinarily not be reimbursed for rental payments for use of the defaulting carrier's property, sanction a taking of the defaulting carrier's private property for public use without just compensation in violation of the Fifth Amendment.

STATEMENT

1. Section 1(16)(b) of the Interstate Commerce Act, 49 U.S.C. (Supp. V) 1(16)(b),[1] gives the Commission emergency authority, in certain specified circumstances, to direct a rail carrier temporarily to provide for the handling, routing, and movement of traffic over the lines of another carrier when the other carrier is unwilling or unable to transport the traffic offered to it in default of that carrier's public service obligations. Section 1(16)(b)(E) permits the directed carrier to recover from the government a sum equal to the amount by which the cost of its directed operations exceeds the revenues derived from those operations.

Subsection (E) defines cost as "those expenditures made or incurred in or attributable to the operations as directed, including the rental or lease of necessary equipment, plus an appropriate allocation of common expenses, overheads, and a reasonable profit." That subsection also directs the Commission to prescribe a form on which a directed carrier may record its reimbursable costs; the

[1]Section 1(16)(b) was added to the Act by Section 601(e) of the Regional Rail Reorganization Act of 1973, 87 Stat. 1021. Its full text is set forth at Pet. App. 101a-103a.

Commission is responsible for certifying to the Secretary of the Treasury the amount of reimbursement to be paid under the Act to any directed carrier.

In March 1975, the Commission promulgated regulations (Pet. App. 26a-36a) prescribing a general cost form and procedures for the submission of information to justify reimbursement under Section 1(16)(b). The Commission's accompanying report (Pet. App. 37a-93a) addressed the question whether rental payments made by a directed carrier to a carrier unwilling or unable to transport traffic for the use of that carrier's lines and facilities are reimbursable costs within the meaning of the Act.

The Commission determined that, "in the usual situation, where costs exceed revenues, no compensation or rent for the use of the defaulting carrier's lines and facilities is required," because "there is no economic loss to the defaulting carrier resulting from the Commission's ordering of directed service," and because "the Commission's ordering of such service confers certain substantial benefits * * * which in most cases are sufficient to discharge any obligation to pay such compensation or rent" (Pet. App. 59a). Since no rent is required to be paid in those circumstances, the Commission concluded that such rental payments would not qualify as costs within the statutory definition—that is "expenditures made or incurred in or attributable to the operations as directed." Section 1(16)(b)(E), 49 U.S.C. (Supp. V) 1(16)(b)(E).

2. In January 1975, prior to the promulgation of the Commission's cost reimbursement regulations, petitioner, a Pennsylvania rail carrier, acting in response to financial losses in connection with its own rail operations, issued an embargo with respect to all traffic over its lines. To avoid a disruption of essential service, the Commission,

pursuant to Section 1(16)(b) of the Act, issued emergency service orders (Pet. App. 104a-123a) directing two other rail carriers—Lehigh Valley Railroad Company and the Reading Company—to provide service over petitioner's lines for 60 days. The orders were subsequently extended for an additional period of 180 days. Petitioner unsuccessfully sought to obtain rent from Lehigh Valley and Reading for the use of its lines and facilities during the life of the service orders (see Pet. App. 9a).

Petitioner did not seek review of the service orders themselves, and it here concedes their validity (Pet. 7). Instead, petitioner filed in the court of appeals a petition to review the Commission's cost reimbursement regulations, contending, *inter alia*, that the Commission's refusal to provide for the reimbursement of a directed carrier's rental payments to a defaulting carrier for use of its lines and facilities amounts to authorizing an unlawful taking of the defaulting carrier's private property without just compensation.[2]

The court of appeals upheld the validity of the Commission's regulations (Pet. App. 1a-25a). It was "satisfied from a review of the obligations imposed on a railroad to continue service until receiving Commission approval to abandon, even when continuation results in not unreasonable losses, and from an examination of the effects on the other carrier of directed operations that directed service, when unprofitable and as currently implemented by the ICC, does not constitute a taking for

[2]Petitioner states that it filed a petition to review the Commission's cost reimbursement regulations, rather than a complaint seeking an award of just compensation for the alleged taking involved in Lehigh Valley's and Reading's use of its lines, because it was "concerned that it might be barred by the collateral attack doctrine from challenging the cost form regulations in a Court of Claims proceeding for compensation" (Pet. 7).

which compensation in the form of rental to the other carrier for the use of its lines must be provided" (Pet. App. 19a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

Petitioner's arguments reduce to one—that the Commission's regulations, insofar as they deny reimbursement to a directed carrier for rental payments made for the use of another carrier's lines and facilities, invalidly sanction a taking of the other carrier's private property for a public use without just compensation, in violation of the Fifth Amendment. Petitioner accordingly insists on a right to continued income from its rail properties even though (a) it ceased its own rail operation on those properties contrary to its public service obligations, and (b) by its cessation of service petitioner has avoided continued loss operations. The court of appeals, in an opinion on which we rely, correctly rejected petitioner's contentions.

1. The court of appeals correctly held that directing one carrier temporarily to operate on the lines of another carrier unwilling or unable to continue service does not constitute a taking of private property for public use. That holding was based on the well-established principles that the Commission "has the power to order a carrier that has not obtained a certificate of abandonment under 49 U.S.C. 1(18) to continue to provide service for as much as 240 days, the maximum period of directed service, despite a cash deficiency or operating losses" (Pet. App. 20a) and that

> a railroad or its estate may be made to suffer interim reasonable losses, without compensation, for a reasonable period of time during which solutions accommodating the public and private interests can

be devised—that is the exercise of the rights and remedies of the owners of the carrier or its estate may be postponed for a reasonable length of time without effecting a taking [Pet. App. 21a-22a].

See *New Haven Inclusion Cases*, 399 U.S. 392, 493; *In re Penn Central Transportation Co.*, 384 F. Supp. 895, 919 (Regional Rail Reorganization Act Special Court).[3]

Since a carrier may itself be required to continue operations for a reasonable time, even at a loss to itself, without effecting a taking, it follows, as the court of appeals held, that there is no taking within the meaning of the Fifth Amendment when the Commission directs another carrier to provide the service and thereby *saves* the defaulting carrier the losses which it could be constitutionally required to incur in maintaining service. As the court of appeals stated (Pet. App. 24a):

> Although as a conceptual matter, ordering a carrier to continue operations for 240 days may differ from placing another carrier on those lines for 240 days, we do not think this possible difference dictates a holding here that the latter constitutes a taking but the former does not. It might be anomalous indeed if the ICC could order forced deficit operations by a

[3]Thus in the *New Haven Inclusion Cases*, this Court held that the New Haven's statutory obligation to continue operations during the seven years required for the reorganization proceeding, at a loss of millions of dollars, did not constitute a taking for which compensation was constitutionally required. 399 U.S. 392, 490-493. As the Court explained, the obligation of the owners of a railroad to continue service, even at a loss, for a reasonable period of time is justified by the fact that "by their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *Id.* at 492 (quoting from *Reconstruction Finance Corp.* v. *Denver & R.G.W.R. Co.*, 328 U.S. 495, 536).

> railroad and not effect a taking, but could not order another carrier to discharge those same duties, thereby in the usual case saving that railroad operating costs, without such action constituting a taking. The ICC does not take title to the other carrier's property during directed service. The other carrier's rights to sell or dispose of its property for non-railroad use are no more qualified during directed service than they are normally since prior ICC approval is required in either case.[4]

[4]The doctrine of *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, and other cases on which petitioner relies (Pet. 14-15) does not apply to petitioner's circumstances and does not invalidate the cost reimbursement regulations which it challenges. While a railroad may not constitutionally be required permanently to maintain loss operations which have no foreseeable prospect of anything but loss, petitioner has made no showing that its operations had no foreseeable prospect of profit. Petitioner has not filed for reorganization or liquidation; its threatened cessation of operations was based on what it claimed to be a recent downturn in traffic rather than a chronic condition (Pet. App. 8a); and it did not even apply for authority to abandon operations until one week before the expiration of directed service (Pet. App. 9a-10a). There is therefore no basis for a contention (Pet. 15) that it had a constitutional right under the *Brooks-Scanlon* doctrine to abandon operations. That doctrine is also inapplicable because the directed operations did not require petitioner to suffer any loss in maintaining the service over its lines.

In any event, as this Court recognized in the *New Haven Inclusion Cases*, *supra*, the *Brooks-Scanlon* doctrine is subject to the qualification that a carrier can be required to maintain loss operations for a period reasonably necessary to complete reorganization or liquidation proceedings, or to implement other solutions designed to protect the public interest in rail service. The rule is also subject to the qualification that before it may abandon service the carrier must exhaust "all reasonable efforts" to maintain service short of impairing its ability to conduct an orderly liquidation. *In re Penn Central Transportation Co.*, *supra*, 384 F. Supp. at 919, n. 31; *Myers* v. *Jay Street Connecting Railroad*, 259 F. 2d 532, 536 (C.A. 2). Petitioner has made no showing that the limited

2. Even if directed service were deemed to constitute a taking, petitioner has suffered no resulting loss for which compensation is required. In fact, petitioner benefited substantially from the directed service. As the court of appeals stated, "the other carrier during a directed operation sustains no operating losses because the directed carrier transports the other carrier's traffic for it" (Pet. App. 23a). On the contrary, the more likely result of directed service—and the result that the court found to be true in petitioner's case—is that the other carrier will be "spared losses it might otherwise have been legally required to incur" (Pet. App. 23a). Furthermore, "the other carrier's properties are maintained and in some cases upgraded during the directed operation" (*ibid.*). Directed service also maintains existing relationships with shippers to the obvious benefit of a defaulting carrier. Consequently, "rather than suffering a diminution of their collateral, the most that the owners of a carrier suffer as a result of directed service is a postponement of their remedy of abandonment, for which no compensation is necessary" (*ibid.*).

Finally, as the Commission observed in its report, since the carrier itself can foreclose directed service by choosing "to continue operating or, * * * with appropriate authorization, * * * [to] convert its properties to another use" (Pet. App. 59a), it is fair to conclude that any economic loss to the carrier results not from the Commission's ordering of directed service but from the carrier's own default on its obligation to provide service (*ibid.*).

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period of directed service exceeded that which was reasonably necessary to protect the public interest or that it took all reasonable steps to maintain service. Petitioner has not even taken the first step usually incumbent on a financially distressed carrier, which is filing for reorganization.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

The opinion of the U.S. Court of Appeals (Pet. App., 1a-25a) is reported at 540 F.2d 71. The report of the Interstate Commerce Commission (Pet. App., 37a-93a) is published at 348 I.C.C. 251.

The proceedings in the Court of Appeals concerned a petition for review of orders entered by the Interstate Commerce Commission in a rulemaking proceedi[illegible]nsti-tuted under section 601(e) of Regional Rail Reorganization Act of 1973, 45 U.S.C. 791(e).

This legislation was before the court in other respects. *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Petitioner, Lehigh & New England Railway Company, operates wholly within the Commonwealth of Pennsylvania. It challenges the I.C.C.'s regulations primarily on the ground that the agency declined to require that rent be paid to a carrier over whose lines the I.C.C. had directed another carier to operate.

Petitioner in early 1975 embargoed all shipments, alleging inadequate funds to continue railroad operations. The I.C.C. directed that neighboring carriers – Lehigh Valley Railroad Company and Reading Company – operate certain portions of Lehigh & New England Railway.

Petitioner now seeks compensation for "rent" by the Government, even though its operations were at a deficit, and even though the operations performed by the directed carriers also were at a deficit.

This case does not warrant plenary consideration by this Court. It is settled that a railroad may not discontinue operations without permission from state or federal regulatory agencies. *Palmer v. Massachusetts*, 308 U.S. 79 (1939); *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

Petitioner is not entitled to enrichment based upon its own dereliction of its common carrier duties.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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